93-832

No. _____

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ST. ELIZABETH MEDICAL CENTER,

Petitioner,

v.

JIMMIE DEAN BROWNING, et al., and
CONEY MITCHELL,

Respondents.

**Petition For A Writ Of Certiorari
To The Ohio Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

DEBORAH R. LYDON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel of Record for Petitioner

K. C. GREEN
SARA SIMRALL RORER
FREDERICK N. HAMILTON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio Supreme Court's abolition of the immunity conferred by Ohio Revised Code § 2305.25 constitutes a denial of due process under the United States Constitution, because it exposes Ohio hospitals to liability against which they cannot defend?

2. Whether Ohio's law as to the accrual of negligent credentialing claims, as retroactively applied by the Ohio Supreme Court, constitutes a denial of due process under the United States Constitution by denying hospitals the benefit of any statute of limitations?

3. Whether the decision of the Ohio Supreme Court in this case deprived Petitioner of its due process right to an unbiased decision maker?

PARTIES

The parties to the consolidated appeal before the Ohio Supreme Court, whose judgment is sought to be reviewed, were:

1. St. Elizabeth Medical Center,[1] which was a named defendant in the separate actions in the lower courts, *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* and *Coney Mitchell v. James C. Burt, M.D., et al.*, and is the petitioner herein;

2. Jimmie Dean and Lawrence Browning, Plaintiffs in their separate action in the lower courts, and who are respondents here;

3. Coney Mitchell, Plaintiff in her separate action in the lower courts, and who is a respondent here;

4. James C. Burt, M.D., who was a named defendant in *Browning* and *Mitchell*, but who is not a party to this petition because Petitioner does not believe he has any interest in the outcome of this petition; and

---

[1] St. Elizabeth Medical Center, Inc., is an Ohio not-for-profit corporation, whose members (pursuant to Ohio Revised Code § 1702.13) are Franciscan Health System of Dayton, Inc., an Ohio not-for-profit corporation, and Franciscan Sisters of the Poor Health System, Inc., a Delaware corporation (whose member is Franciscan Sisters of the Poor, an Ohio not-for-profit corporation).

PARTIES – Continued

5. Max Blue, M.D., who was a defendant in *Browning* only, but who is not a party to this petition because Petitioner does not believe he has any interest in the outcome of this petition.[2]

---

[2] Petitioner hereby notifies the Court and parties to the proceedings below that it believes that neither Defendant Blue nor Defendant Burt has an interest in the outcome of this petition. This petition, however, has been served upon all parties to the proceedings below. *See* U.S. Sup. Ct. R. 12.4 and 29.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Background 2

A. Hospital Peer Review – an Overview 3

B. Ohio's Law as to the Accrual of Negligent Credentialing Claims Prior to *Browning* 4

II. Procedural and Factual Posture 6

A. *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* – in the Lower Courts 6

B. *Coney Mitchell v. James C. Burt, M.D., et al.* – in the Lower Courts 8

C. The Consolidated Appeals Before the Ohio Supreme Court 9

REASONS FOR GRANTING THE WRIT 12

I. This Court Should Decide Whether the Abolition of Peer Review Immunity for Ohio Hospitals Deprives Those Hospitals of Any Meaningful Opportunity to Defend "Negligent Credentialing" Claims and Contravenes the Vital Public Interest in Protection of Medical Peer Review 13

TABLE OF CONTENTS – Continued

Page

II. This Court Should Decide Whether the Ohio Supreme Court's "Alerting Event" Discovery Rule Governing the Accrual of "Negligent Credentialing" Claims, as Applied Retroactively, Deprives Ohio Hospitals of Due Process 16

A. The Ohio Supreme Court's Holdings as to the Applicable Statute of Limitations as Well as the "Alerting Event" Accrual Rule for Negligent Credentialing Claims Established Two New Principles of Law 17

B. The Retroactive Application of the Ohio Supreme Court's Alerting Event Discovery Rule Retards Important Policies Underlying the Statute of Limitations 20

C. The Retroactive Application of the "Alerting Event" Discovery Rule Would Be Inequitable... 23

III. This Court Should Determine Whether the Ohio Supreme Court Has Demonstrated Pervasive and Unfair Prejudice in This Case, Thus Depriving St. Elizabeth Medical Center of Its Right to an Unbiased Decision Maker and Unfairly Impacting Its Defense in Pending Cases 25

CONCLUSION 29

APPENDIX A[3]

Browning v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (Ohio, August 25, 1993) (entry denying rehearing)..... A-1

---

[3] Because they are voluminous, the appendices are presented in a separately filed volume.

TABLE OF CONTENTS – Continued

Page

Mitchell v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (Ohio, August 25, 1993) (entry denying rehearing)..... A-2

Petition for Rehearing of Appellant, St. Elizabeth Medical Center, *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993) (appendices omitted)..A-3

Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993)..... A-28

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. CA 12176, Slip Opinion (Ohio App. August 20, 1991)..... A-77

Coney Mitchell v. James C. Burt, M.D., et al., No. CA 12244, Slip Opinion (Ohio App. August 26, 1991)..... A-91

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. 89-1341 (Ohio C.P. December 5, 1989) (decision and order granting summary judgment)..... A-96

Coney Mitchell v. James C. Burt, M.D., et al., No. 88-4468, (Ohio C.P. January 12, 1990) (decision and order granting summary judgment).....A-103

Hanks v. Burt, No. 12257, 1991 WL 6312 (Ohio App., Jan. 25, 1991)..... A-108

Related Ohio Cases Pending at the Time of Publication of *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993)..... A-114

APPENDIX B

Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101, *et seq.*.....B-1

TABLE OF CONTENTS – Continued

Page

APPENDIX C

Ohio Revised Code § 2305.10 (Anderson 1991)....C-1

Ohio Revised Code § 2305.11 (Anderson Supp. 1992)..... C-2

Ohio Revised Code § 2305.25 (Anderson Supp. 1992)..... C-7

Ohio Revised Code § 2305.251 (Anderson 1991)...C-9

APPENDIX D

Fazzone v. Western Reserve Care System, No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991)..... D-1

Raggazine v. St. Elizabeth Hospital Medical Center, No. C.A.129, 1991 WL 184817 (Ohio App. September 19, 1991).....D-5

TABLE OF AUTHORITIES

Page

CASES

Albain v. Flower Hospital, 50 Ohio St. 3d 251, 553 N.E.2d 1038 (1990) 2, 13, 24

Allenius v. Thomas, 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989) 4, 5, 10, 19

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 15

Bell v. Sharp Cabrillo Hosp., 211 Cal. App. 3d 1339, 260 Cal. Rptr. 37, 41, *modified on other grounds*, 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886 (1989) 18

Berdyck v. Shinde, 66 Ohio St. 3d 573, 613 N.E.2d 1014 (1993) 15

Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, (D.D.C. 1970) *aff'd*, 479 F.2d 920 (D.C.Cir. 1973) 3

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 12, 23

Bronson v. Sisters of Mercy Health Corp., 175 Mich. App. 647, 438 N.W.2d 276 (1989) 18

Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993, *reh'g denied*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) ..... *passim*

Burness v. New York Central R. Co., 380 U.S. 424 (1965) 21

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) .. 16, 17, 25

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 25

Fazzone v. Western Reserve Care Sys., No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991) 18

TABLE OF AUTHORITIES – Continued

Page

Gardiner v. A.H. Robins, 747 F.2d 1180 (8th Cir. 1984).....27, 28

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)..... 13

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992)....25-27

Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992)..... 26

Hanks v. Burt, No. 12257, 1991 WL 6312 (Ohio App. Jan 25, 1991), *jur. mot. overruled*, 61 Ohio St. 3d 1413, 574 N.E.2d 1076 (1991).....5, 17

Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978) 22

Hershberger v. Akron City Hosp., 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987) 5, 19

Hoffman v. Davidson, 31 Ohio St. 3d 60, 508 N.E.2d 958 (1987)..... 19

In Re Murchison, 349 U.S. 133 (1955) 25

Lewis v. Curtis, 671 F.2d 779 (3rd Cir. 1982), *cert. denied*, 459 U.S. 880 (1982) 25

Lindsey v. Normet, 405 U.S. 56 (1972).....15, 16

Lombard v. Good Samaritan Medical Center, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982) 15

Mackey v. Montrym, 443 U.S. 1 (1979)..... 12, 15, 24, 29

TABLE OF AUTHORITIES – Continued

Page

Mathews v. Eldridge, 424 U.S. 319 (1976).....13, 24

Mayberry v. Pennsylvania, 400 U.S. 455 (1971)..... 25

Nickey v. Mississippi, 292 U.S. 393 (1933) 15

O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84, 447 N.E.2d 727, 732 (1983).....20, 22

Offutt v. United States, 348 U.S. 11 (1954)..... 25

Oliver v. Kaiser Community Health Foundation, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983)..... 19

Proctor v. Southwest General Hosp., 78 Ohio App. 3d 608, 605 N.E.2d 975 (1992)..... 18

Raggazine v. St. Elizabeth Hosp. Medical Ctr., No. C.A. 129, 1991 WL 184817 (Ohio App. September 19, 1991)..... 18

Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944)..... 21

Richards v. St. Thomas Hospital, 24 Ohio St. 3d 27 492 N.E.2d 821 (1986) 19

Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964)..... 15

Stein v. New York, 346 U.S. 156 (1953)..... 29

United States v. Kubrick, 444 U.S. 111 (1979).....20, 21

United States v. Marion, 404 U.S. 307 (1971)..... 21

STATUTORY, CONSTITUTIONAL, AND RULE AUTHORITIES

U.S. Const. Amend. XIV, § 1..... 1, 12, 27, 29

28 U.S.C.A. § 1257(3) (West 1993)..... 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.A. § 1320c (West 1991)..... 3

42 U.S.C.A. § 1395bb(a) (West 1992)..... 3

42 U.S.C.A. § 11101 (West Supp. 1993).....2, 3

42 U.S.C.A. § 11137 (West Supp. 1993)..... 4

Ohio Rev. Code § 2305.10 (Anderson 1991).....2, 10

Ohio Rev. Code § 2305.11 (Anderson Supp. 1992) 2, 4, 9, 10, 18

Ohio Rev. Code § 2305.25 (Anderson Supp. 1992) 2, 11, 16

Ohio Rev. Code § 2305.251 (Anderson 1991).....2, 14

Sup. Ct. R. 10.1 (c)..... 13

MISCELLANEOUS AUTHORITIES

A Compendium of State Peer Review Immunity Laws (American Medical Association) 1988..... 4

Ex-Patients of Burt Can Sue St. E's, Dayton Daily News, July 1, 1993, at 1A..... 27

Joint Commission on Accreditation of Health Care Organizations, *Accreditation Manual for Hospitals* (1993)..... 3

Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance* in THE ECONOMICS OF MEDICAL MALPRACTICE (S. Rothenberg, ed. 1978)..... 23

'Love Doctor' Can Be Put on Trial, Court Rules, Cleveland Plain Dealer, July 1, 1993, at 5B..... 27

Note, *Medical Peer Review Protection in the Health Care Industry,* 52 Temple L. Q. 552 (1979)..... 4

TABLE OF AUTHORITIES – Continued

Page

Note, *Peer Review Protection: The Pennsylvania Approach at the Crossroads,* 91 Dick. L. Rev. 329 (1986) 3

Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review,* 51 U. Pitt. L. Rev. 1025 (1990) 15

OPINIONS BELOW

The judgment of the Ohio Supreme Court, entered June 30, 1993, is reported at *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993). (*See* Appendix, *infra*, A-28.) This judgment consolidated for decision the separate appeals from the Ohio Court of Appeals for the Second Appellate District, Montgomery County, Ohio, captioned *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.*, Appeal No. CA 12176, and *Coney Mitchell v. James C. Burt, M.D., et al.*, Appeal No. CA 12244. The opinions of the Ohio Court of Appeals in *Browning* and *Mitchell* are unreported. (*See* Appendix, *infra*, A-77-A-95.) The opinions of the Montgomery County Court of Common Pleas granting summary judgment in *Browning* and *Mitchell* also are unreported. (*See* Appendix, *infra*, A-96-A-107.)

JURISDICTION

The judgment from the Ohio Supreme Court was rendered on June 30, 1993. A timely petition for rehearing was denied by that court on August 25, 1993, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(3) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. Amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101, *et seq.* (West Supp. 1993) appear in Appendix B.

III. Provisions of the Ohio Revised Code appear in Appendix C as follows:

Ohio Rev. Code § 2305.10 (Anderson 1991)
Ohio Rev. Code § 2305.11 (Anderson Supp. 1992)
Ohio Rev. Code § 2305.25 (Anderson Supp. 1992)
Ohio Rev. Code § 2305.251 (Anderson 1991).

STATEMENT OF THE CASE

I. Background

This Petition arises from two of forty-plus similar actions filed in the Court of Common Pleas, Montgomery County, Ohio. All of these cases involve claims of medical malpractice against Dr. James Burt and allegations that Petitioner, St. Elizabeth Medical Center ("SEMC"), was negligent in allowing and continuing Dr. Burt's hospital privileges (referenced by the courts and parties below as a "negligent credentialing" claim).

In Ohio, a hospital may be liable on a negligent credentialing claim if it continues a physician's hospital privileges when, through its peer review process, it knew or should have known that the physician had developed a pattern of incompetence. *See Albain v. Flower Hospital,* 50 Ohio St. 3d 251, 258, 553 N.E.2d 1038, 1045 (1990). Thus, a negligent credentialing claim necessarily involves scrutiny of the quality of an Ohio hospital's peer review process, and might more appropriately be described as a "negligent peer review" claim.

For the reasons that follow, if the Ohio Supreme Court's holdings as to Ohio's negligent credentialing laws go undisturbed by this Court, Petitioner faces trial in these cases unfairly prejudged and unable to fully defend itself in violation of the guarantees established by the Due Process Clause of the U.S. Constitution.

A. Hospital Peer Review – an Overview

The promotion of health care quality improvement through the process of hospital peer review serves patients by improving care and reducing patient injury. Peer review is a principal mechanism for ensuring the quality and appropriateness of health care, including a reduction in the incidents of medical malpractice, in the United States. *See generally* Health Care Quality Improvement Act of 1986, § 402, 42 U.S.C.A. § 11101 (West Supp. 1993) (hereafter, "HCQIA").

In general, peer review refers to attempts within the medical profession to monitor the quality of care provided by its members. In addition to self-imposed regulation, federal law mandates that health care entities engage in peer review. To qualify for reimbursement of funds expended to administer Medicare and Medicaid reimbursement, for example, a hospital must meet certain standards for peer review.[4]

The peer review process governed by individual hospital by-laws and rules is the primary mechanism available to hospitals for promoting quality health care. *See* Note, *Peer Review Protection: The Pennsylvania Approach at the Crossroads,* 91 Dick. L. Rev. 329, 337 (1986). In enacting the HCQIA, Congress specifically found that there was "an overriding national need to provide incentive and protection for physicians engaging in effective peer review." *See* 42 U.S.C.A. § 11101(5) (West Supp. 1993).

Confidentiality is essential to the effective functioning of hospital peer review. If the substance of professional peer review committee meetings were made public, physicians would be unwilling to serve on peer review committees. The entire peer review process, then, would disintegrate. *See Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970) *aff'd*, 479 F.2d 920 (D.C.Cir. 1973) For this reason, all

---

[4] *See* 42 U.S.C.A. § 1395bb(a) (West 1992); Joint Commission on Accreditation of Health Care Organizations, *Accreditation Manual for Hospitals*, § MS.2 (1993). Congress has also created Professional Standard Review Organizations ("PSROs") to act as peer review groups and to promote the best delivery of health care. *See* 42 U.S.C.A. §§ 1320c to 1320c-19 (West 1991) (enacting PSROs).

fifty states have enacted peer review statutes that protect confidentiality and provide immunity to hospitals and those who participate in peer review activities.[5] The purpose of these protections is to encourage peer review activity, which will result in improved health care by lowering costs and raising quality.[6]

B. Ohio's Law As to the Accrual of Negligent Credentialing Claims Prior to the *Browning* Decision

Before the Ohio Supreme Court's judgment here, numerous cases, including Respondents' respective actions for negligent credentialing against Petitioner, were summarily adjudicated by several different trial court judges as time-barred under the established "discovery rule" for Ohio medical malpractice cases, as reiterated just four years ago in *Allenius v. Thomas,* 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989).[7]

Allenius represented the culmination of a succession of Ohio Supreme Court cases applying the discovery rule to Ohio Revised Code § 2305.11(B)(1), the one-year statute of limitations for "medical claims." In Ohio, a "medical claim" includes "any claim that is asserted in any civil action against a physician, podiatrist, or hospital, . . . and that arises out of the medical diagnosis, care, or treatment of any person." Ohio Rev. Code § 2305.11(D)(3) (Anderson Supp. 1992). The *Allenius* court held that:

> [A cause of action accrues when there is] an occurrence of a "cognizable event" which does or should

---

[5] *See A Compendium of State Peer Review Immunity Laws* (American Medical Association), 1988, at vi.

[6] *See* Note, *Medical Peer Review Protection in the Health Care Industry*, 52 Temple L. Q. 552 (1979). Moreover, certain provisions of the federal HCQIA (*e.g.*, 42 U.S.C.A. § 11137 (West Supp. 1993)), and hospital accreditation guidelines underscore the prominence of confidential hospital peer review activities in national health care improvement policies.

[7] The cases in which the trial courts granted summary judgment to SEMC on the statute of limitations issue, and which were pending when the Ohio Supreme Court rendered its decision, below, are designated in the Appendix, *infra*, A-114.

> lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

42 Ohio St. 3d at 133, 538 N.E.2d at 96 (explaining *Hershberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987)).

As discussed above, various Ohio trial courts summarily disposed of several of these Dr. Burt-related negligent credentialing claims against SEMC as being *untimely* under the *Allenius* standard. Therefore, the additional question of whether SEMC was *immune from liability* under Ohio or federal peer review statutes was not raised by any party. In the first of the Dr. Burt-related cases to be decided on appeal, the trial court's grant of summary judgment in favor of SEMC was affirmed on the basis of the statute of limitations. The court of appeals reasoned that the plaintiffs' causes of action in that case against Dr. Burt and SEMC accrued contemporaneously, and that their lawsuit was untimely under the *Allenius* discovery rule. *See Hanks v. Burt*, No. 12257, 1991 WL 6312 (Ohio App. Jan. 25, 1991), *jur. mot. overruled*, 61 Ohio St. 3d 1413, 574 N.E.2d 1076 (1991). (*See* Appendix, *infra*, A-108.)

Subsequently, however, the Ohio Supreme Court abrogated these established principles as to the accrual of claims against health care providers and undermined the important health care policies embodied in state and federal peer review laws when it issued its unprecedented judgment in the instant case, which was consolidated from the separate actions of *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* and *Coney Mitchell v. James C. Burt, M.D., et al. See* 62 Ohio St. 3d 1502, 583 N.E.2d 973 (1992). Its judgment as to both cases is discussed below.

II. PROCEDURAL AND FACTUAL POSTURE

A. *Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al.* – in the Lower Courts

Respondents Jimmie Dean and Lawrence Browning filed their complaint on April 17, 1989 against Petitioner SEMC, Dr. Max Blue, and Dr. James Burt for injuries which Respondents allegedly sustained from multiple surgeries performed on Ms. Browning by Drs. Blue and Burt at SEMC from 1982 to 1986. Respondents alleged that these defendant physicians, as members of SEMC's medical staff, performed unnecessary surgery on Ms. Browning without her consent.[8]

Drs. Burt and Blue performed surgery which consisted of an exploratory laparotomy, vaginal reconstruction, circumcision of her clitoris and insertion of a urinary catheter in February of 1982. Two weeks before the 1982 vaginal reconstruction surgery, Ms. Browning was advised, through a letter on SEMC stationery, that the Executive Committee of SEMC's Medical Staff had reviewed the surgery which she was about to undergo and considered it to be an "unproven, non-standard practice of gynecology." After acknowledging the receipt of this information, however, Ms. Browning consented to the surgery in writing. After this surgery, Ms. Browning allegedly developed a myriad of unusual and exacerbated symptoms and underwent a number of additional surgeries performed by Dr. Blue up through 1987.

Despite being advised as early as 1982 that the Executive Committee considered Dr. Burt's surgery to be "unproven" and "non-standard," Ms. Browning purportedly did not begin to investigate her concern over the medical treatment rendered at SEMC until June of 1987. Then, she went to other health care providers at the Cleveland Clinic, where she was

---

[8] Petitioner and Dr. Blue answered separately, each denying liability and specifically raising the statute of limitations as a defense. Because Dr. Burt failed to answer, the Brownings' motion for default judgment against him was granted on July 21, 1989; that order, however, did not determine a specific monetary recovery against Dr. Burt.

told that there had been a "flaw" in her surgery. Ms. Browning admitted that, since August of 1987, she believed that malpractice had been committed.

After Ms. Browning's discovery deposition was taken in this case, SEMC and Dr. Blue separately filed motions for summary judgment based on the statute of limitations. The trial court found that Respondents' claims accrued, at the latest, in August, 1987. Because their action was filed a year and eight months thereafter, the court granted SEMC's motion for summary judgment, concluding the action was untimely under Ohio's one-year medical claim statute of limitations. (*See* Appendix, *infra*, A-96.) On February 2, 1990, the trial court issued a similar ruling dismissing Respondents' claims against Dr. Blue.[9]

The Browning Respondents appealed to the Ohio Court of Appeals for the Second Appellate District. In a decision issued on August 20, 1991, the court of appeals affirmed the summary judgment dismissing Ms. Browning's claims against Dr. Blue, but reversed the trial court's grant of summary judgment in favor of SEMC. (*See* Appendix, *infra*, A-77.) The appellate court agreed with the parties and the trial court that Ohio's medical claim statute of limitations was applicable to Ms. Browning's claims against SEMC and Dr. Blue. (*Id.*, at A-80-81.) Moreover, the appellate court agreed that Ms. Browning's medical claim *against Dr. Blue* accrued, at the latest, in August, 1987. Thus, it affirmed the trial court's judgment that Ms. Browning's action against Dr. Blue was barred by the one-year statute of limitations. (*Id.* at A-86-87.)

Nevertheless, the court of appeals ruled that Ms. Browning's medical claim against SEMC was not time-barred – even though Respondents had contended that their claims as to the various Defendants accrued contemporaneously. According to

---

[9] The court granted these motions for summary judgment despite an affidavit filed by the Respondents, which stated that in October, 1988, Ms. Browning watched a *West 57th Street* television program which revealed that Dr. Burt had performed his surgery upon numerous other patients; according to Ms. Browning, that program marked the time she first suspected that malpractice had taken place.

the appellate court, Ms. Browning may not have had sufficient facts to place her on notice of SEMC's specific negligence until October, 1988 when she viewed a *West 57th Street* television program about Dr. Burt. (*Id.* at A-89.)

SEMC timely appealed to the Ohio Supreme Court. Respondents did not appeal the ruling upholding the dismissal of Ms. Browning's malpractice claim against Dr. Blue and, therefore, that aspect of the case is final.

B. *Coney Mitchell v. James C. Burt, M.D., et al.* – in the Lower Courts

Respondent Mitchell's Complaint, captioned one for "Medical Malpractice," was filed on December 14, 1988; it is similar to that filed by Respondent Browning, except that in addition to SEMC, Ms. Mitchell sued only one Co-Defendant – James Burt, M.D. In her deposition, Respondent Mitchell testified that she underwent the surgery at issue on January 23, 1985, at SEMC. It is undisputed that, prior to undergoing surgery, Ms. Mitchell signed an identical consent form as appears in the record in *Browning*.

After the surgery, Ms. Mitchell contended that her pre-existing problems worsened and that she developed urinary incontinence and constant bladder pain. Several weeks after the surgery, Ms. Mitchell purportedly examined her genitalia and discovered that, in her words, her vagina "was covered over" and "sewn up." She repeatedly complained to Dr. Burt regarding this problem, and eventually had a "heated argument" with him on this topic before she terminated her physician-patient relationship with him in 1987.

After taking Ms. Mitchell's deposition, SEMC filed a motion for summary judgment based on the statute of limitations. In response, Ms. Mitchell provided an affidavit, just as Respondent Browning had, inferring that she did not suspect any malpractice until she had viewed the October, 1988 *West 57th Street* television program. The trial court, nevertheless, found that Ms. Mitchell's causes of action accrued in 1985 when she knew about the changed appearance of her vaginal area and believed that she was experiencing new medical

problems. Thus, the trial court determined that Respondent Mitchell's claim against SEMC was not filed within the one-year period of limitations and was therefore time-barred. (*See* Appendix, *infra*, at A-103.)

Respondent Mitchell appealed. On August 26, 1991, the appellate court issued its separate Opinion and Entry. (Appendix, *infra* at A-91.) The court rejected Respondent's arguments, but reversed the judgment favoring SEMC, citing as authority its decision of August 20, 1991 in *Browning v. Burt*. SEMC then filed its timely appeal to the Ohio Supreme Court.

C. *The Consolidated Appeals Before the Ohio Supreme Court*

In the Ohio Supreme Court, SEMC contended that the court of appeals erred in reversing the trial courts' grants of summary judgment. *The parties stipulated that Ohio's decisional law as to the medical claims statute of limitations, Ohio Revised Code § 2305.11(B)(1), controlled SEMC's appeal.* Thus, the *only* question properly before the Ohio Supreme Court was whether the medical claim discovery rule – the "cognizable event" rule – had been applied properly to the facts of these cases.

On June 30, 1993, the Ohio Supreme Court affirmed on other grounds the separate opinions of the court of appeals. *Browning v. Burt*, 66 Ohio St. 3d 544, 563, 613 N.E.2d 993, 1008 (1993) (hereafter, "*Browning II*"). Its four substantive rulings and its "Conclusion" as to SEMC, however, go far beyond the narrow issue posed by these two cases and constitute rulings upon questions which were neither fully briefed nor argued.

First, the court held that Respondents' claims against SEMC were not "medical claims" arising out of the "medical diagnosis, care, and treatment" of these patients under Ohio Revised Code § 2305.11(D)(3); rather, the court held that negligent credentialing claims are ordinary negligence claims. *Id.* at 558, 613 N.E.2d at 1004. Thus, contrary to the conclusions of the parties and the lower courts in the proceedings below (as well as the parties and trial courts in several other

related cases in which summary judgment was granted to SEMC on limitations grounds), the Ohio Supreme Court ruled that Ohio's two-year statute of limitations in Ohio Revised Code § 2305.10 governed instead of the medical claims statute (allowing one year) found within Ohio Revised Code § 2305.11(B)(1). *Id.*

Second, although it claimed to be "borrowing" from the "cognizable event" discovery rule established for medical malpractice cases in *Allenius v. Thomas* (*id.* at 559, 613 N.E.2d at 1005), the Ohio Supreme Court "constructed" a new "alerting event" discovery rule for negligent credentialing claims, holding:

> [A] cause of action for negligent credentialing arises when the plaintiff knows or should know that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.

Id. at 560, 613 N.E.2d at 1006. It further stated that:

> It is sufficient if a plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices.

Id. at 561, 613 N.E.2d at 1006.

Third, the Ohio Supreme Court's majority expressed its belief that Respondents' executions of the "special consent form" just prior to their surgeries, and their awareness of the multiple medical problems that arose almost immediately thereafter, were probably insufficient to cause their claims against SEMC to arise under this new discovery test. *Id.* at 560-61, 613 N.E.2d at 1006.[10] They believed instead that Respondents' claims did not accrue until the claimants viewed the television program about other patients who had been treated by Dr. Burt. *Id.*

---

[10] On the other hand, Chief Justice Moyer (joined by Judge Cook) concluded that the special consent form, in conjunction with Plaintiffs' injuries, was sufficient on its own *as a matter of law* to begin the running of the statute of limitations, even under the majority's new discovery rule. *Id.* at 570, 613 N.E.2d at 1012.

Fourth, although the issue was not ripe for its consideration, the Ohio Supreme Court stated that Ohio's peer review immunity statute, despite its express language to the contrary, does not immunize *hospitals* from liability on negligent credentialing claims.[11] Thus, without the benefit of full briefing or arguments of the parties, and without notice to the parties, the Ohio court rendered its *sua sponte* decision.

Finally, after setting forth its substantive holdings as to whether Respondents' claims against SEMC were filed, as a matter of law, outside the statutory period of limitations, *the only issue which had been before that, or any, court in this matter*, the Ohio Supreme Court majority wrote the following "Conclusion":

> [W]e do not pass judgment (since issues of alleged liability are yet to be determined) on Dr. Blue or SEMC, although it is tempting to do so given what the record shows has happened to these two women. Perhaps now they, *and others*, will have their day in court, *where the conspiracy of silence in the local medical community which permitted the atrocities to be committed, and the atrocities themselves, can be more fully explored.*

Id. at 565, 613 N.E.2d 1008-09. (Emphasis added.)

In a timely motion for rehearing, SEMC specifically argued that the Ohio Supreme Court's decisions, as to (1) the retroactive application of the new limitations rule and (2) the unavailability of Ohio's statutory peer review immunity defense, effectively deprived it of any meaningful opportunity to defend itself on these (and other) negligent credentialing

---

[11] In the courts below, neither the *Browning* nor *Mitchell* parties presented the question of whether Ohio Revised Code § 2305.25 conferred immunity upon hospitals (or peer review participants) in a negligent credentialing case. That question was *not* raised as an issue in the trial court, nor did the court of appeals address it. Although SEMC, and the Ohio Hospital Association (as *amicus*), made passing references to that provision in briefs submitted to the Ohio Supreme Court (in footnotes), none of the propositions of law or assignments of error raised by the parties in the Ohio Supreme Court or Ohio Courts of Appeals involved any aspect of Section 2305.25.

claims in violation of the due process guaranty of the Fourteenth Amendment of the United States Constitution. (*See* Appendix, *infra*, A-3.) Additionally, SEMC requested that the Ohio Supreme Court rehear this matter to correct the impression of judicial partiality and prejudgment of the merits of this case which would be inferred from the language used by the majority in its "Conclusion." SEMC argued that such bias denied it due process of law under the guaranty of the Fourteenth Amendment.

On August 25, 1993, the Ohio Supreme Court denied, without opinion, SEMC's petition for rehearing.[12] Because the Ohio Supreme Court's judgment not only affirmed the court of appeals on different grounds, but also represented rulings on matters that were not addressed in the trial or appellate courts' opinions below, SEMC's petition for rehearing was its first opportunity to raise these substantial federal constitutional questions. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930).

REASONS FOR GRANTING THE WRIT

Unless this Court reviews and vacates the judgment below, the Ohio Supreme Court's rulings will have deprived Petitioner, SEMC, of "due process in the primary sense" because it has not had, nor will it ever have, a full and fair opportunity to present its case in defending against these claims. *See Brinkerhoff-Faris*, 281 U.S. at 681. Because these rulings have so impaired SEMC's ability to raise meaningful defenses, there is a substantially increased risk that liability will be imposed based upon an erroneous and incomplete record. Such a result is antithetical to the basic rules of justice embodied in the Constitution. U.S. Constitution, Amend. XIV, § 1. *See, e.g., Mackey v. Montrym*, 443 U.S. 1, 13 (1979);

---

[12] The Ohio Supreme Court issued separate orders denying SEMC's Motion for Rehearing. *See Browning v. Burt*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) (entry denying rehearing) and *Mitchell v. Burt*, 67 Ohio St. 3d 1439, 617 N.E.2d 688 (1993) (entry denying rehearing). (Copies of these orders appear in the Appendix, *infra*, A-1 – A-2.)

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12-13 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Moreover, the rulings below deprive all Ohio hospitals of any meaningful way to defend negligent credentialing claims and undermine important federal and Ohio policies intended to assure quality medical care to the public. These substantial and novel constitutional questions merit this Court's review and, ultimately, vacation of the rulings below. *See* Sup. Ct. R. 10.1 (c).

I. This Court Should Decide Whether the Abolition of Peer Review Immunity for Ohio Hospitals Deprives Those Hospitals of Any Meaningful Opportunity to Defend "Negligent Credentialing" Claims and Contravenes the Vital Public Interest in Protection of Medical Peer Review.

Analytically, a plaintiff in a "negligent credentialing" claim must show that a hospital granted or continued staff privileges to an incompetent physician. *See Albain*, 50 Ohio St. 3d at 258, 553 N.E.2d at 1045. The required proof for the *prima facie* case might include only (1) proof of the holding of staff privileges by the physician in question, and (2) actual or constructive knowledge on the part of the hospital that the physician had developed a "pattern of incompetence which the hospital *should have become aware of* through its peer-review process." *See id.* (emphasis added). Thus, a plaintiff's *prima facie* case as to negligent credentialing may be satisfied without the need to resort to evidence of the *actual* credentialing procedures which had occurred at the hospital.

An adequate defense of any such suit, on the other hand, must, in fairness, allow the introduction of proof by the hospital that a reasonable investigation of a physician's qualifications and continued competence actually occurred, as foundation for proof that the decision which resulted from the peer review process (i.e. the credentialing or retention of the physician involved) was a reasonable one. However, under Ohio law (and notwithstanding the opinion of the Ohio

Supreme Court in *Browning II*), neither the details of the investigation nor the opinion(s) which resulted from the investigation may be disclosed by a hospital such as SEMC in its own defense. This is true because Ohio Revised Code § 2305.251 expressly provides, in pertinent part:

> Proceedings and records [of peer review committees] shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against . . . a hospital . . . arising out of matters which are the subject of evaluation and review by the committee. No person in attendance at a meeting of a review committee or serving as a member of a review committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof.

In other words, in attempting to defend a negligent credentialing claim, a hospital and the members of its peer review committees cannot offer any evidence as to what they *actually* did to evaluate the physician or what they knew or did not know in reaching that credentialing decision. Under *Browning II*, however, a hospital would have no credentialing immunity and yet would have to defend its credentialing decisions without being permitted to introduce proof of those matters which the committees considered or the opinion(s) of the committee members upon which the hospital reasonably relied in acting upon the committees' recommendations; it is, therefore, disabled from presenting the very exculpatory evidence necessary to show that its actions in retaining the physician on its staff were reasonable.

As discussed *supra*, pp. 3-4, Ohio's peer review immunity provisions are consistent with those of virtually all states and the federal government. Such provisions reflect the broad recognition that peer review can fulfill its vital role in improving the quality of medical care only if hospitals and other participants in peer review activities engage in self-critical analysis unencumbered by fears of liability.

The opinion of the *Browning II* court, despite the clear intent of the Ohio Legislature, revives this inherent conflict in Ohio's peer review laws, and, in so doing, violates the federal due process rights of SEMC to raise every available defense. *See generally Lindsey v. Normet*, 405 U.S. 56, 66 (1972), *citing American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *Nickey v. Mississippi*, 292 U.S. 393, 396 (1933). Additionally, the duties imposed by the *Browning II* court, viewed in light of Ohio and federal health care policy, require Ohio hospitals to rely upon the physician peer reviewers (who remain immune), and to accept sole responsibility for their activities, while being forbidden to defend "negligent credentialing" claims with proof that the peer review process and final decision were reasonable in a given case. Such a situation, very simply, is fundamentally unfair.

Accordingly, by abolishing the immunity of Ohio hospitals for peer review activities, and at the same time failing to consider the privilege for peer review information, the *Browning II* court exposes SEMC to substantial liability while depriving it of any real opportunity to defend claims of negligent credentialing.[13] Such manifest injustice is abhorrent to fundamental notions of due process. *See Mackey*, 443 U.S. at 13.

---

[13] Furthermore, the hospital in such cases is put in the position of being charged with failure to adequately evaluate a physician's performance (manifestly a duty which can only be owing from one qualified to conduct such an evaluation [i.e. a physician]), while being technically unable (by virtue of its lack of qualifications in that regard) to do so. *See* Note, *Restructuring Hospital-Physician Relations:Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025, 1032 (1990) (arguing that because hospital administrators are technically unable to review the technical aspects of a physician's qualifications and practice, hospital administrators must necessarily accept the peer review committee's conclusions and recommendations). In the words of the *Browning II* court, "[a] *hospital* does not practice medicine and is incapable of committing malpractice." 66 Ohio St. 3d at 556, 613 N.E.2d at 1003, *citing Lombard v. Good Samaritan Medical Center*, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982); *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964). In a decision released the same day as *Browning II*, the Ohio Supreme Court declared that "because they are prohibited from practicing medicine, hospitals . . . cannot pass on the efficacy of a course of treatment." *Berdyck v. Shinde*, 66 Ohio St. 3d 573, 580, 613 N.E.2d 1014, 1021 (1993).

This Court's review of the peer review immunity issue is vital because of the substantial constitutional and public policy questions involved. Moreover, that the *Browning II* majority *sua sponte* elevated the discussion of peer review immunity under Ohio Revised Code § 2305.25 from a passing reference in one footnote in the brief of SEMC to the syllabus law of the case also impaired SEMC's right to raise every available defense. *See, generally, Lindsey*, 405 U.S. at 66. As a matter of basic fairness to the parties (and all Ohio hospitals that will be affected by the sweeping decision below), this peer review immunity issue, with all its concomitant due process and health care policy implications, assuredly must not be decided without, at least, full argument by the parties to the litigation.

II. This Court Should Decide Whether the Ohio Supreme Court's "Alerting Event" Discovery Rule Governing the Accrual of "Negligent Credentialing" Claims, as Applied Retroactively, Deprives Ohio Hospitals of Due Process.

The Ohio court majority also announced a new discovery rule specifically tailored for negligent credentialing claims against hospitals, and, for the first time, has declared that such claims are controlled by Ohio's general negligence statute of limitations instead of its medical claim statute of limitations. The retroactive application of this new discovery rule, using a different statute of limitations, to revive the claims of Respondents, posed an additional violation to SEMC's right to due process under the Fourteenth Amendment of the Constitution.

The fundamental unfairness of any retroactive application of the majority's new limitation rules for negligent credentialing claims is readily apparent under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In *Chevron*, this Court held that three factors should be considered in deciding whether due process requires that a judicial decision be applied non-retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . , or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application,. . . . .

Id. at 106-07 (citations omitted). For the following reasons, consideration of these factors clearly weighs against retroactive application of the Ohio Supreme Court's new discovery rule.

A. The Ohio Supreme Court's Holdings as to the Applicable Statute of Limitations as Well as the "Alerting Event" Accrual Rule for Negligent Credentialing Claims Established Two New Principles of Law.

The Ohio Supreme Court's *sua sponte* application of its *two-year* personal injury statute of limitations, rather than the *one-year* medical claims statute of limitations, obviously establishes a new principle of law. The parties had no quarrel with what was understood to be the settled, controlling law: they stipulated it. Several trial court judges who granted summary judgment in similar cases never envisioned the Ohio Supreme Court's novel rule applying the two-year statute of limitations; nor did the court of appeals which had affirmed a grant of summary judgment based on the statute of limitations in an earlier Dr. Burt case prior to issuing the decision in *Browning II*. *See Hanks v. Burt*, No. 12257, 1991 WL 6312 (Ohio App. Jan. 25, 1991). (*See* Appendix, *infra*, A-108). In fact, the court of appeals, in its separate *Browning* and *Mitchell* decisions, had concluded that the medical claims statute of limitations applied to Respondents' claims against SEMC.

See Browning II, 66 Ohio St. 3d at 560, 613 N.E.2d at 1005-06.

Before the *Browning II* decision was issued, Ohio courts consistently construed diverse claims against hospitals to be "medical claims." *See, e.g., Proctor v. Southwest General Hosp.*, 78 Ohio App. 3d 608, 605 N.E.2d 975 (1992) (claim for a hospital's failure to provide an "appropriate hospital setting, proper psychiatric care and treatment, and safe surroundings" falls within definition of "medical claim"); *Fazzone v. Western Reserve Care Sys.*, No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991) (claim of negligent maintenance of an operating room by a hospital arises out of the "care" rendered to a patient for purposes of Ohio Revised Code § 2305.11(D)(3)) [copy attached, *infra*, Appendix D1]; *Raggazine v. St. Elizabeth Hosp. Medical Ctr.*, No. C.A. 129, 1991 WL 184817 (Ohio App. September 19, 1991) (claim that hospital employee improperly used a bedpan constitutes a "medical claim") [copy attached, *infra*, Appendix D5].

The decision below also conflicts with the law of other states. California and Michigan courts, for example, when faced with the same question have held that negligent credentialing claims are professional negligence claims – not "general negligence claims." *See Bronson v. Sisters of Mercy Health Corp.*, 175 Mich. App. 647, 652-53, 438 N.W.2d 276, 279 (1989) (explaining that the provision of professional care by a hospital includes decisions regarding selection and retention of its medical staff); *Bell v. Sharp Cabrillo Hosp.*, 211 Cal. App. 3d 1339, 260 Cal. Rptr. 37, 41, *modified on other grounds*, 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886 (1989) (noting that because a hospital's effectiveness in selecting and reviewing the competence of its medical staff is a necessary predicate to delivering quality health care, its inadequate fulfillment of that responsibility constitutes "professional negligence" under California's malpractice statutes).

As these Michigan and California courts observed, and as the *Browning II* majority seemed to realize (but then, ruled contrarily), negligent credentialing claims are inextricably related to, and necessarily arise from, an underlying claim of medical malpractice against a physician practicing at the

defendant hospital. *See* 66 Ohio St. 3d at 557-58, 613 N.E.2d at 1004; *see also id.*, at 567, 613 N.E.2d at 1010 (Moyer, C.J., concurring in part and dissenting in part). Under these circumstances, therefore, SEMC reasonably relied upon the fact that, under prior pronouncements of law, Respondents' claims against it were "medical claims."

A second, unexpected change in Ohio law occurred when the Ohio Supreme Court in *Browning II* neglected both the letter and spirit of its prior pronouncements on the "discovery rule" in medical and non-medical cases by creating an "alerting event" discovery rule. The Ohio Supreme Court now holds that a cause of action for negligent credentialing against a hospital does not accrue until the patient is (or should be) aware of the specific negligence committed by the defendant hospital, *i.e.*, (1) the legal duty owed to her by the hospital as regards credentialing of physicians; and (2) the hospital's breach of that duty. *See id.* at 560-61, 613 N.E.2d at 1006.

This new "alerting event" rule abandons the established law of Ohio as to the accrual of claims against health care providers – that such claims accrue upon discovery of the injury. This rule was first established in *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 117, 449 N.E.2d 438, 443-44 (1983). Subsequently, the Ohio Supreme Court adhered to a discovery-of-the-injury accrual rule; it specifically, and repeatedly, rejected the contention that discovery-of-the-specific-negligence (malpractice) or discovery-of-the-"legal injury" had to occur for such a claim to accrue. *See, e.g., Allenius v. Thomas*, 42 Ohio St. 3d 131, 538 N.E.2d 93 (1989); *Hershberger v. Akron City Hospital*, 34 Ohio St. 3d 1, 4-5, 516 N.E.2d 204, 207 (1987); *Hoffman v. Davidson*, 31 Ohio St. 3d 60, 508 N.E.2d 958 (1987); *Richards v. St. Thomas Hospital*, 24 Ohio St. 3d 27, 28, 492 N.E.2d 821, 823 (1986).

Thus, contrary to its suggestion that it was "borrowing" from *Allenius* when it created its novel "alerting event test" herein, *Browning II*, 66 Ohio St. 3d at 559, 613 N.E.2d at 1005, the Ohio Supreme Court broke totally new and unanticipated ground when it determined that discovery of a hospital defendant's specific negligence would be necessary to

trigger the statute of limitations at issue herein. *See id.* at 568-69, 613 N.E.2d at 1010-11 (Moyer, C.J., concurring in part and dissenting in part).

Moreover, before now, the medical claims "cognizable event" discovery rule represented Ohio law as to the accrual of various personal injury causes of action for which *any* discovery rule was available. For example, the Ohio Supreme Court expressly adapted the medical claims discovery rule for latent disease cases, which are subject to Ohio's distinct personal injury statute of limitations, Ohio Revised Code § 2305.10 (which statute the Ohio Supreme Court now holds to be applicable to negligent credentialing claims). *See O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 90, 447 N.E.2d 727, 732 (1983). Thus, the Ohio Supreme Court's rulings that the "alerting event" test should be applied to the personal injury statute of limitations, singularly and cumulatively, marked a drastic change in Ohio law.

B. The Retroactive Application of the Ohio Supreme Court's Alerting Event Discovery Rule Retards Important Policies Underlying the Statute of Limitations.

The Ohio Supreme Court majority gave no reason for departing from the traditional discovery rule for tort actions when it fashioned its unique "alerting event" test to revive Respondents' negligent credentialing claims against SEMC. Ohio's prior, well established discovery rule for medical and non-medical personal injury claims was adopted to mitigate the harsh consequences for potential plaintiffs occasioned by strict adherence to the limitation period; a discovery-of-injury rule, therefore, permitted recovery in those situations in which the potential plaintiff had no reason to investigate her claims earlier when she did not know that she had been injured. *O'Stricker*, 4 Ohio St. 3d at 90, 447 N.E.2d at 732. Such reasoning, apparently, also convinced this Court to adopt a similar discovery-of-injury rule for federal claims. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979).

Such a policy of preserving claims of those potential plaintiffs who do not even know they had been injured makes sense, and protects those potential plaintiffs' rights to pursue their remedies. *See, e.g., id.* at 120 n.7 (explaining that in actions under the Federal Employers' Liability Act, fairness requires that a plaintiff's cause of action does not accrue until there is discovery of the injury in cases in which an "unknown and unknowable" injury has not manifested itself). Those values, however, would be amply, and fairly, addressed simply by adhering to the traditional "discovery-of-injury" rule for negligent credentialing claims. Instead, however, the new "discovery-of-injury-and-specific-negligence" test has been developed by the Ohio Supreme Court without any additional justification, to the unfair prejudice of a defending Ohio hospital.

The retroactive application of the new alerting event discovery test undermines the purpose of statutes of limitation. As this Court has recognized, statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time and that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.' " *Kubrick,* 444 U.S. at 117 (quoting *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349 (1944)). As further noted in *Kubrick*:

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Id. (citing, *inter alia, United States v. Marion,* 404 U.S. 307, 322, n.14 (1971); *Burness v. New York Central R. Co.,* 380 U.S. 424 (1965)).

Similarly, before now, Ohio law also reflected the basic tenet that fundamental fairness to defendants required that

claims must be brought in a timely fashion. In *O'Stricker*, the Ohio Supreme Court aptly stated:

> The rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases.

4 Ohio St. 3d at 88, 447 N.E.2d at 731, *citing Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299, 302 (1978).

The Ohio Supreme Court majority's special discovery rule for negligent credentialing claims against hospitals totally undermines the important policies underlying statutes of limitations. *Browning II* effectively eliminates any requirement for a plaintiff to promptly investigate possible remedies – even though she knows of her injuries and should suspect that they were caused by the negligence of another.

Under the unprecedented standard announced in *Browning II*, accrual is so divorced from pain and injury – signs that a lay person can understand and act upon – that "discovery" may never occur, excepting sheer coincidence or affirmative efforts by third persons to foment litigation. In these cases, for example, the only evidence which the Ohio Supreme Court's majority thought might establish "discovery" of SEMC's specific negligence was the Respondents' acknowledgements that in October of 1988, they had watched a television program about Dr. Burt. Ironically, if they had denied seeing the program (candidly or otherwise), or if the case were of less notoriety and not subject to extensive media attention, according to the Ohio Supreme Court, "discovery" would not have occurred even at that time, and perhaps not for years or decades thereafter – if ever. Such a discovery rule irrationally undermines the policies underlying statutes of limitation.

Additionally, the toll, in hospital costs, of the increased liability exposure of Ohio hospitals under *Browning II* will be

significant. One commentator, discussing the "crisis" in medical malpractice insurance which occurred in the mid-seventies, attributed the rise in hospital malpractice insurance premiums (from $ 28.7 million in 1960 to $ 145.5 million in 1974), in part, to changes in legal rules and doctrine which made it easier for a medical malpractice plaintiff to pursue a claim, including the prolongation of statutes of limitations through the "discovery rule."[14] The fundamental changes in Ohio law effected by the *Browning II* decision will likewise inevitably contribute to the spiralling cost of hospital care in Ohio.

C. The Retroactive Application of the "Alerting Event" Discovery Rule Would be Inequitable.

The inequity of retroactive application here is also readily apparent. This situation is strikingly similar to that presented in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, the plaintiff brought suit in a Missouri court to defend against a tax assessment. On appeal, the Supreme Court of Missouri overruled the prior well-established rule that the state tax board had no jurisdiction to hear appeals, and held that the plaintiff therein was not entitled to relief because it had failed to exhaust its newly created administrative remedies. *Id.* at 675. In *Brinkerhoff-Faris*, this Court held that the Missouri court's retroactive rule violated due process of law because plaintiff was denied an opportunity to defend against the tax assessment. It held that such a denial amounts to a deprivation of property without due process of law. *Id.* at 679.

Here, retroactive application of the Ohio Supreme Court's "alerting event" rule changes well-established law with respect to the statute of limitations. Until this case, there

---

[14] *See* Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance* in THE ECONOMICS OF MEDICAL MALPRACTICE 167, 176-80 (S. Rothenberg, ed. 1978). Additional explanations for the rise in malpractice claims cited by the author include the abolition of charitable and governmental immunity, abandonment of the "locality rule," application of *respondeat superior*, and application of the doctrine of informed consent. *Id.*

was no reason for hospitals to preserve records, keep track of witnesses, or otherwise stand ready to defend credentialing decisions of many years past because potential claims were barred under any known interpretation of the applicable statute of limitations.

Moreover, the drastic new discovery rule for hospitals clearly will put such defendants at an unfair and inordinate disadvantage in defending negligent credentialing claims. As explained above, one element of a negligent credentialing claim is that there was malpractice by the physician in question. *See Albain*, 50 Ohio St. 3d at 258, 553 N.E.2d at 1045. Many years after the fact such claims may be impossible to defend, especially if the physician is unwilling to get involved or absent (as here in the case with Dr. Burt). The unfair prejudice to Ohio hospitals occasioned by the retroactive application of the new "alerting event" test is manifest considering that, as in these very cases, the allegedly negligent physician, who would be best able to defend the malpractice claim, very likely may be shielded by the statute of limitations (which accrues under Ohio's "cognizable event" test), and may choose to avoid the proceeding altogether.

Thus, in a negligent credentialing claim, the hospital is left to defend both the underlying malpractice and the credentialing claims alone, without the participation of the physician and likely without benefit of critical records that have been lost or destroyed years before. As a result, the hospital has no meaningful opportunity to tell its side of the story and bears a substantial risk that its liability for damages will be based on an erroneous and incomplete record. Such a result clearly violates the United States Constitution. *See Mackey*, 443 U.S. at 14.

This Court has explained that procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not simply the rare exceptions. *See Eldridge*, 424 U.S. at 344. If such a rule has continuing viability at all, this Court's review of this matter is warranted because the untoward and unconstitutional reach of the retroactive application of this new discovery rule extends far beyond SEMC in its defense of

these particular claims. Indeed, under this new rule, Ohio hospitals facing potential liability obtain no repose at all from the statute of limitations except, arguably, in a situation where a hospital's *prima facie* liability is obvious – something highly unlikely given the clear Ohio and federal policies, as explained above, which favor the strict confidentiality of peer review proceedings. Thus, except in the most notorious cases, the *Browning II* test produces an endless limitation period; in effect, no limitation period exists at all.

For these reasons, the retroactive deprivation of a meaningful opportunity for SEMC to fully defend itself constitutes an unwarranted denial of due process of law. *See Chevron*, 404 U.S. at 108-109. This Court, therefore, should grant SEMC's certiorari petition so that it may review and reverse the judgment below as to the new discovery rule for negligent credentialing claims in Ohio.

III. This Court Should Determine Whether the Ohio Supreme Court Has Demonstrated Pervasive and Unfair Prejudice in This Case, Thus Depriving St. Elizabeth Medical Center of Its Right to an Unbiased Decision Maker and Unfairly Impacting Its Defense in Pending Cases.

Due Process mandates that a court which hears cases and controversies not only must be unbiased, but must avoid even the appearance of bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *In Re Murchison*, 349 U.S. 133, 136 (1955) *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954). Fairness to SEMC requires the decision in this case to have been based upon the law and not upon emotion or a preconceived notion of how the cases should be resolved on the merits. Impartiality and the appearance of impartiality are the *sine qua non* of the American judicial system. *Haines v. Liggett Group*, 975 F.2d 81, 98 (3rd Cir. 1992), *quoting Lewis v. Curtis*, 671 F.2d 779, 789 (3rd Cir. 1982), *cert. denied* 459 U.S. 880 (1982).

The language of the majority's "Conclusion," as quoted *supra*, p. 11, demonstrates prejudgment of the merits of these cases. Although acknowledging these cases were not before the court on the merits, and notwithstanding the introductory language ("we do not pass judgment * * * on Dr. Blue and SEMC"), the opinion unequivocally declares that the "record shows" that the Respondents were victims of "atrocities," and that these "atrocities" were "permitted" by a "conspiracy" involving SEMC. *Browning II*, 66 Ohio St. 3d at 565, 613 N.E.2d at 1008-09. An atrocity is an atrocious act, and the use of this term plainly denotes contemptible conduct. A more clear-cut instance of prejudgment of the merits of a pending case can scarcely be imagined.

In *Haines v. Liggett,* the United States Court of Appeals for the Third Circuit considered the following analogous comments made by a district court judge in a published opinion adjudicating a discovery dispute:

> All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Haines, 975 F.2d at 97, *quoting Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992). Based upon this pronouncement, the Third Circuit directed the reassignment of the case to a different judge of the district court. Explaining, the court noted:

> The final decision to be rendered by an eventual jury here is whether petitioners, consisting of leading members of the tobacco industry, conspired to withhold information concerning the dangers of tobacco use from the general public. . . . This, we

> repeat, is the ultimate issue to be determined by a jury, as fact finders, after appropriate instructions given them by the trial judge.
>
> Measured against these precepts, it is impossible for us to vindicate the requirement of "appearance of impartiality" in view of the statements made in the district court's prologue to its opinion.

Id. at 98.

Just as in *Haines*, the opinion of the Ohio Supreme Court in this case belies the "appearance of impartiality" required of state courts under the Fourteenth Amendment to the United States Constitution. Indeed, whether "atrocities" were in fact, committed, and whether a "conspiracy of silence" arose, are issues which had not been fully litigated and, thus, would have to be submitted to the trier of fact for resolution. Accordingly, SEMC's federal right to an unbiased decision maker has been denied.

In addition to abridging SEMC's Constitutional due process rights by prejudgment of the merits of these cases, the opinion has worked a deprivation of SEMC's property rights through the likely effect of the published comments (and the publicity generated thereby)[15] upon these and other related cases now pending in Ohio courts.[16] This deprivation is even more likely since the court *specifically refers to cases not before it* when declaring that women had been victims of "atrocities:" "[p]erhaps now they, *and others*, will have their day in court . . . [.]" (Emphasis added.) *See Browning II*, 66 Ohio St. 3d at 565, 613 N.E.2d at 1009.

A case illustrating the problem is *Gardiner v. A.H. Robins*, 747 F.2d 1180 (8th Cir. 1984). In *Gardiner*, the Eighth Circuit reviewed comments of a district court judge

---

[15] *See Ex-Patients of Burt Can Sue St. E's*, Dayton Daily News, July 1, 1993, at 1A; *'Love Doctor' Can Be Put on Trial, Court Rules*, Cleveland Plain Dealer, July 1, 1993, at 5B. Both news accounts reprinted the comments regarding "atrocities," and the "conspiracy of silence."

[16] A list of related cases involving both Dr. Burt and SEMC which were pending at the time of the Ohio Supreme Court's decision in *Browning II* is appended hereto at A-114.

made at a settlement hearing, at which the district court judge accused several officers of the defendant corporation of misconduct. The court held that this and similar conduct on the part of the district court judge violated the defendant's due process rights, explaining:

> As a party to the litigation, Robins was entitled to due process, the essence of which is a fair trial before a tribunal free from bias or prejudice. The record is clear that, at the time he issued the reprimand, Judge Lord had decided the merits of the underlying dispute against Robins, even though there had been no trial . . . Those comments in such a context exhibit a pervasive bias and prejudice as to deprive Robins of its due process right to a hearing before an impartial judge.

Id. at 1191-92 (citations omitted). Further, the court noted that the district court's comments deprived the defendant corporation of property interests protected by due process:

> Robins was entitled to due process not only as a litigant under the jurisdiction of the district court, but also because its property interests were implicated by Judge Lord's public reprimand. The reprimand has been used against Robins in other Dalkon Shield cases across the country, resulting in potential prejudice to Robins' litigation posture in those cases. The adverse publicity Robins has received from the public reprimand could conceivably have caused Robins other forms of property damages as well.
>
> *Id.* at 1191-92, n.16.

Just as in *Gardiner*, the comments of the majority in *Browning II* are certain to adversely affect SEMC's "litigation posture" in the forty-plus related pending cases in Ohio. As noted by the *Gardiner* court, "[a] trial judge's comments adverse to a party before trial commences can easily prejudice the minds of jurors and other judges." *Id.* at 1194.

The opinion of the Ohio Supreme Court in *Browning II* denied basic fair play to SEMC, by prematurely reaching and

improperly evaluating cases not presented for review on the merits. By suggesting that SEMC "permitted" the commission of "atrocities," the opinion has prejudged SEMC's defenses in these and dozens of similar Ohio cases. Accordingly, this petition should be granted so that the *Browning II* decision can be reviewed and vacated, and these consolidated cases can be remanded for an impartial rehearing to ensure that SEMC is accorded a full and fair opportunity to present its defenses.

CONCLUSION

Under the American system of justice, the adversary system usually provides a defending party with the process that is due because it is the best means for ascertaining the truth and minimizing the risk that an erroneous deprivation of property will occur. *Mackey*, 443 U.S. at 13. If these cases are left unreviewed by this Court, however, SEMC faces trial on the merits on these and dozens of other related cases prejudged and unable to fully and fairly defend itself in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution. *See id.* at 20 (Stewart, J., dissenting) ("This settled principle [of due process] serves to ensure that the person threatened with loss has an opportunity to present his side of the story . . . "). Such a result is patently unfair and subverts the truth finding process.

SEMC is not asking this Court to review and reverse mere judicial errors of state law. Rather, when, as in this case, SEMC has been subjected to a miscarriage of justice of such gravity and magnitude that should not be tolerated in "an enlightened system of justice," this Court's review of a state's highest court's rulings is needed to uphold Petitioner's rights to due process. *See Stein v. New York*, 346 U.S. 156, 181 (1953).

Moreover, if unchecked, Ohio's new rules of law for negligent credentialing claims will contravene important federal and Ohio health care quality improvement policies, and result in further escalation of hospital expenses and consumer costs. It is imperative, therefore, that this Court review, and

ultimately reverse, the several unconstitutional rulings of the Ohio Supreme Court, as outlined herein. It should then remand this matter for rehearing before an impartial panel for a full and fair consideration of these issues consistent with this Court's opinion.

Respectfully submitted,

DEBORAH R. LYDON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel of Record for Petitioner

K. C. GREEN
SARA SIMRALL RORER
FREDERICK N. HAMILTON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Of Counsel

(2) No. 93-832

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ST. ELIZABETH MEDICAL CENTER,

Petitioner,

v.

JIMMIE DEAN BROWNING, et al., and
CONEY MITCHELL,

Respondents.

Petition For A Writ Of Certiorari To The Ohio Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DEBORAH R. LYDON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel of Record for Petitioner

K.C. GREEN
SARA SIMRALL RORER
FREDERICK N. HAMILTON
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Of Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

APPENDIX INDEX

Page

APPENDIX A

Browning v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 993 (Ohio, August 25, 1993) (entry denying rehearing) A-1

Mitchell v. Burt, 67 Ohio St. 3d 1439, 617 N.E.2d 993 (Ohio, August 25, 1993) (entry denying rehearing) A-2

Petition for Rehearing of Appellant, St. Elizabeth Medical Center, *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993) (appendices omitted) A-3

Browning v. Burt, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993) A-28

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. CA 12176, Slip Opinion (Ohio App. August 20, 1991) A-77

Coney Mitchell v. James C. Burt, M.D. et al., No. CA 12244, Slip Opinion (Ohio App. August 26, 1991) A-91

Jimmie Dean Browning, et al. v. James C. Burt, M.D., et al., No. 89-1341 (Ohio C.P. December 5, 1989) (decision and order granting summary judgment) A-96

Coney Mitchell v. James C. Burt, M.D., et al., No. 88-4468, (Ohio C.P. January 12, 1990) (Decision and order granting summary judgment) A-103

Hanks v. Burt, No. 12257, 1991 WL 6312 (Ohio App., Jan 25, 1991) A-108

APPENDIX INDEX – Continued

Page

Related Ohio Cases Pending at the Time of Publication of *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993) A-114

APPENDIX B

Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101, *et seq*..... B-1

APPENDIX C

Ohio Rev. Code § 2305.10 (Anderson 1991)..... C-1

Ohio Rev. Code § 2305.11 (Anderson 1991)..... C-2

Ohio Rev. Code § 2305.25 (Anderson 1991)..... C-7

Ohio Rev. Code § 2305.251 (Anderson 1991)..... C-9

APPENDIX D

Fazzone v. Western Reserve Care System, No. 90 C.A. 72, 1991 WL 124428 (Ohio App. July 2, 1991)..... D-1

Raggazine v. St. Elizabeth Hospital Medical Center, No. C.A. 129, 1991 WL 184817 (Ohio App. September 19, 1991)..... D-5

APPENDIX A

THE SUPREME COURT OF OHIO

1993 TERM

To wit: August 25, 1993

Case No. 91-2079

REHEARING ENTRY

(Montgomery County)

Jimmie Dean Browning et al.,
Appellees,

v.

James Burt, M.D., et al.

[St. Elizabeth Medical Center and Max E. Blue, M.D.,
Appellants.]

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. CA12176)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

To wit: August 25, 1993

Case No. 91-2121

REHEARING ENTRY

(Montgomery County)

Coney Mitchell,
Appellees,

v.

James Burt, M.D.,
et al.

[St. Elizabeth Medical
Center,
Appellant.]

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. CA12244)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

NOS. 91-2079
91-2121

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO

JIMMIE DEAN BROWNING, et al.,

Appellees,

vs.

JAMES C. BURT, M.D.,

Defendant,

and

MAX BLUE, M.D., ET AL.

Appellants.

CONEY MITCHELL,

Appellee,

vs.

JAMES C. BURT, M.D.,

Defendant,

and

ST. ELIZABETH MEDICAL CENTER,

Appellant.

MOTION OF ST. ELIZABETH MEDICAL CENTER FOR REHEARING

Frank C. Woodside, III (0000636)
John E. Schlosser (0007831)
K.C. Green (0005435)
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202-3172
(513) 977-8200
Attorneys for Appellant,
St. Elizabeth Medical Center

Neil Freund (0012183)
Robert N. Snyder (0030566)
Freund, Freeze & Arnold
1800 Dayton Arcade Center
1 South Main Street
Dayton, Ohio 45402
(513) 222-2424
Attorneys for Defendant-Appellant,
Dr. Max Blue

James J. Hughes (0021996)
Catherine M. Ballard (0030731)
Bricker & Eckler
100 S. Third Street
Columbus, Ohio 43215
Attorneys for Amicus Curiae,
Ohio Hospital Association

John G. Lancione (0006729)
John D. Liber (0012807)
Peter H. Weinberger (0022076)
Spangenberg, Shibley,
Traci & Lancione
1500 National City Bank Bldg.
Cleveland, Ohio 44114-3062
Attorneys for Appellees

Appellant St. Elizabeth Medical Center ("SEMC") respectfully urges the Court to grant a rehearing in this matter for several reasons. First, the decision, as written, threatens to have a devastating impact upon hospitals in this State and their peer review systems. Second, the majority opinion goes far beyond the issues presented by these two cases and decides questions never briefed and not properly before the Court. Third, the majority sets hospitals apart from all other tort defendants and gives them disparate and punitive treatment as to the statute of limitations. Fourth, the finding that there is no immunity, coupled with the inability to present any evidence as to what was done or known in the peer review process, violates SEMC's right to due process. Fifth, the new discovery test fashioned by the majority, applied retroactively here, also violates SEMC's due process rights. Finally, the majority opinion is tainted by a possible prejudging of the merits of these cases.

SEMC supports its request for rehearing in the memorandum below.

Respectfully submitted,

K.C. Green

Frank C. Woodside, III (0000636)
John E. Schlosser (0007831)
K. C. Green (0005435)
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202-3172
(513) 977-8200
Attorneys for Defendant-Appellant,
St. Elizabeth Medical Center

MEMORANDUM IN SUPPORT

I. IMPACT UPON HOSPITAL PEER REVIEW

The opinion of the majority is virtually certain to have a devastating impact upon hospital peer review and, accordingly, patient care in the state of Ohio. In light of that decision, any prudent physician would hesitate to participate in the peer review process and many would decline to do so. The reasons for that are several.

First, the decision essentially eradicates the statute of limitations for claims of negligent credentialing. The test it establishes, requiring discovery of the negligent credentialing, means that such actions will accrue only in the most extreme of circumstances.[1] Thus, hospitals, and those who participate on their peer review committees, are effectively subject to suit forever for any credentialing decisions they make.

If the possibility of facing litigation at any time into the indefinite future is not disincentive enough for prospective peer review participants, the decision also eliminates the immunity conferred by the Ohio legislature in R.C. §2305.25. It expressly finds the immunity specifically granted to hospitals in R.C. §2305.25 inapplicable in a

---

[1] Here it was only the admissions of Plaintiffs that they had seen the *West 57th Street* television program that allowed the majority to find an accrual date at all. This situation bears comparison to those cases in which this Court has held that a period of limitations could not expire before a plaintiff can know of his claim. Here, the majority opinion holds that a claim can be sued upon and decided as to one party, a physician, before claim for the same injury ever accrues as to another party, the hospital.

negligent credentialing case[2] (and implicitly so holds as to all participants in the peer review process).

In short, the majority says to all Ohio hospitals and physicians or other members of peer review committees: (1) There is potential liability to patients for any and all credentialing decisions; (2) Such suits are likely to be timely whenever brought (i.e. the statute of limitations provides almost no limit to the bringing of stale claims); and (3) There is no immunity from such suits regardless of the diligence or good faith in which the hospital or peer review committee members performed their duties. Further, R.C. §2305.251 severely inhibits the ability of the peer review committee members to defend themselves, precluding any evidence of what was done by the committee or what any particular member's involvement was ("No person . . . serving as a member of a review committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or

---

[2] The reasoning for this ruling is not apparent from the decision. The majority may be legislating the language "No hospital, no state or local society, . . . " entirely out of the statute. Alternatively, the majority may be interpreting the phrase "who is a member or employee of any of the following committees" to modify "hospital," an incredibly strained reading of the statute. A hospital is not a human being and therefore cannot practice medicine (as the majority opinion points out at p. 12) and, similarly, cannot serve as a "member" or "employee" of a peer review committee. The Ohio legislature could not possibly have intended that a hospital be a "member" or "employee" of a peer review committee before the immunity of R.C. §2305.25 would attach. The Ohio legislature, in fact, intended that hospitals receive unqualified immunity under R.C. §2305.25. *See* Ohio Legislative Service Commission, Summary of Enactments (copy attached as Exhibit A), at p. 151.

presented during the proceedings of the committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof. . . . ").

Finally, the majority opinion raises substantial questions as to liability insurance coverage for peer review activities. Comprehensive general liability insurers have apparently already denied coverage in this litigation based upon an exclusion for bodily injury. The finding of the majority that a negligent credentialing claim is not a malpractice action may well be cited by malpractice insurance carriers to deny coverage as well. Thus, those who have participated in peer review committees in the past (as well as those asked to serve in the future), may find their personal assets at stake.

Under these circumstances, the legal advice to any physician or other individual is clear: DO NOT AGREE TO SERVE ON ANY HOSPITAL PEER REVIEW COMMITTEE![3]

II. ISSUES NOT BEFORE THE COURT

The majority opinion goes far beyond the issues posed by these two cases and appears to rule upon questions which were neither fully briefed and argued, nor within the power of the Court to decide. SEMC urges rehearing so that there may be an opportunity to brief

---

[3] Without competently staffed peer review committees, Ohio hospitals will likely lose their accreditation. That could only result in a decline in the quality of health care in Ohio and put Ohio hospitals at a competitive disadvantage to health care facilities in other states.

and argue these issues and/or so the decision can be clarified.

A. The Impact Of The Special Consent Form

As the majority opinion notes, the "narrow issue" in these two cases is whether Plaintiffs' negligent credentialing claims were timely filed – viewed in the context of whether the trial court's granting of summary judgment was correct. Thus, the *only* question before the Court was whether, in construing the facts in a light most favorable to Plaintiffs Browning and Mitchell, there was a genuine issue of material fact as to the accrual and expiration of their claims.

The reverse question – did Plaintiffs timely file their actions as a matter of law – was not before the Court and could not properly be decided. The majority opinion, nonetheless, seems to decide this question. Accordingly, a rehearing is necessary to clarify this point and make clear that genuine issues of fact remain as to the accrual and expiration of Plaintiffs' claims.

The majority opinion sets forth the following discovery rule:

> [A] cause of action for negligent credentialing arises when the plaintiff knows or should know that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.

Opinion at p. 17. It further states that:

> It is sufficient if a plaintiff discovers or, through the exercise of reasonable diligence, should have

> discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices.

Id.

Whether the hospital's special consent form did or did not cause Plaintiffs' claims to arise under this new discovery test *must* be, at minimum, a jury issue. Chief Justice Moyer (joined by Judge Cook) concludes that the special consent form, in conjunction with Plaintiffs' injuries, was sufficient *as a matter of law* to begin the running of the statute of limitations under the majority's discovery rule. Thus, the question of whether the special consent form was an "alerting event" is clearly a factual issue upon which reasonable minds could differ. On remand SEMC should be permitted to try the statute of limitations issues to a jury under the new test announced by the Court. In so doing, SEMC should be able to rely upon the Plaintiffs' execution of the special consent form as a basis for a factual finding by the jury that Plaintiffs knew or should have known of the (alleged) negligent credentialing practices and procedures. SEMC suggests that a rehearing is necessary to give the trial court guidance on this point.

B. Malpractice Versus Bodily Injury Statute of Limitation

Plaintiffs *never* disputed in the trial court that their claims against SEMC were "medical claims" subject to the one year statute of limitations contained in R.C. §2305.11(B). The court of appeals in *Mitchell*, nonetheless, requested the parties brief the issue. (Rec. at 287) Both

sides subsequently filed briefs effectively stipulating that Plaintiffs' claims were "medical claims" to be governed by the one year statute. In their brief to this Court (filed June 11, 1992) Plaintiffs again took the position that the one year period of limitations was applicable here.[4] SEMC concurred and, accordingly, no one briefed, at all, the issue of whether Plaintiffs' causes of action were "medical claims" under R.C. §2305.11(B) or claims for bodily injury under R.C. §2305.10. On this record, SEMC submits there was no basis for the Court to reach this issue. *See, e.g., Thompson v. Merrell Dow Pharmaceuticals, Inc.* (6th Cir. 1985), 766 F.2d 1005, *aff'd* (1986), 478 U.S. 804 (for purposes of deciding matter, court accepts as true the agreement of the parties that there is no private right of action under the Food Drug and Cosmetic Act).

Despite the absence of a dispute between the parties, the majority has concluded that a negligent credentialing claim is one for bodily injury under the period of limitations set forth in R.C. §2305.10. SEMC submits that this decision may have substantial adverse consequences[5] and should not have been reached on a partial or absent

---

[4] Plaintiffs' brief contains absolutely no reference whatsoever to R.C. §2305.10, the statute of limitations for bodily injury claims.

[5] It is entirely possible, for example, that insurance carriers will use this decision to deny coverage for liability arising from peer review activities. In this litigation coverage has apparently been denied to peer review participants under general comprehensive liability policies because of an exclusion for bodily injury. The Court's finding that a claim for negligent credentialing is not a malpractice action may lead malpractice carriers to deny coverage as well.

record. A rehearing is absolutely necessary so that this issue can be fully briefed and argued.[6]

C. Adoption Of A Discovery Rule For General Negligence Claims

Because none of the parties contended Plaintiffs' claims were for bodily injury subject to R.C. §2305.10, there was no opportunity to brief or argue whether a discovery rule should apply to a negligent credentialing claim so characterized. Again, that is a critical issue that should have been fully briefed and argued before being decided.

Before *Browning,* a cause of action generally arose under R.C. §2305.10 at the time the wrongful act was committed. *Caliman v. Mize* (1989), 63 Ohio App. 3d 231, 233, 478 N.E.2d 531; *Doe v. First United Methodist Church* (Ohio App.) 1992 WL281323 (copy attached as Exhibit B) at p. 2. *Caliman* and *Doe,* notably, involved claims against employers for negligent hiring and retention.[7] The *Doe*

---

[6] There are a number of legal and public policy reasons for concluding that a claim for negligent credentialing is a "medical claim." The Court would also benefit from an analysis of how other jurisdictions have decided the question. *E.g. Bronson v. Sister of Mercy Health Corp.,* (Mich. 1989) 438 N.W.2d 276. (Claim of negligence in granting staff privileges to a physician held to be one for malpractice); *Bell v. Sharp Cabrillo Hospital* (1989), 260 Cal. Rptr. 37, 211 Cal. App. 3d 1339 (A hospital's breach of duty to exercise reasonable care in reviewing the competence of its staff physicians held to constitute "professional negligence").

[7] Once a claim for negligent credentialing is deemed a "bodily injury action," these decisions are directly on point here.

court refused to apply a discovery rule and the *Caliman* court held that plaintiffs' claims arose when the alleged negligent hiring occurred. *Doe, slip op.* at p. 2; *Caliman,* 63 Ohio App. 3d at 233-234.

The discovery rule has previously been applied to claims under R.C. §2305.10 only in latent disease cases. *E.G. O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 447 N.E.2d 727. It made sense in those types of cases because many of those Plaintiffs' claims would have otherwise expired before any manifestation of injury occurred. The majority opinion in *Browning,* however, threatens to open up *all* general negligence claims to the discovery rule. SEMC urges that this issue be fully explored by rehearing, so that an informed decision with a complete understanding of the ramifications of same can be reached.[8]

D. Peer Review Immunity

Neither *Browning* nor *Mitchell,* on their records, present the question of whether R.C. §2305.25 confers immunity upon hospitals (or peer review participants) in a negligent credentialing case. That issue was *not* raised in

---

[8] It will be a very rare negligence case, even among very stale cases, that a defendant will be able to demonstrate that a plaintiff should have sooner known, without investigation, not only that he might have been injured through some one's fault, but also the full complement of potential defendants, and the particular negligence of each. There will be no logical way to distinguish any negligence case from a negligent credentialing case, as plaintiffs in all types of personal injury cases are bound to point out to the lower courts of this State.

the trial court, nor did the court of appeals address it. Although SEMC and the Ohio Hospital Association made passing references to that provision in their briefs (in footnotes), none of the propositions of law or assignments of error raised by the parties involved any aspect of R.C. 2305.25.[9] Thus, the issue should not have been decided and the Court's opinion should clarify the fact that this question was not presented by the record. Alternatively, this matter should be reheard so that the immunity issue can be fully briefed and argued.

III. DISPARATE TREATMENT OF HOSPITALS AS TO STATUTES OF LIMITATION

The discovery rule fashioned by the majority treats hospitals differently than all other tort defendants. This disparate treatment, rendered without any justification, constitutes a violation of the equal protection and due process clauses of the U.S. and Ohio Constitution. U.S. Const. Amend. XVI, §1; Ohio Const. Art. I §§2 and 16.

The new discovery rule to be applied in cases alleging negligent peer review, according to the majority, requires not only discovery of the injury, but discovery of the hospital's particular *negligence* as well (see syllabus, headnote 4). No other tort defendant in the state of Ohio is faced with such a broad, virtually unlimited discovery rule.

This Court has expressly rejected a discovery of the negligence test in cases alleging physician malpractice.

---

[9] R.C. §2305.25 is not cited anywhere in Plaintiff-Appellees' Brief.

E.g. Hershberger v. Akron City Hospital (1987), 34 Ohio St. 3d 1, 516 N.E.2d 204; *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, 538 N.E.2d 93. Even in latent disease cases (e.g. asbestos, DES, etc.), the plaintiff need not discover the negligence of the defendant before the statute of limitations, R.C. §2305.10, begins to run. There, the statute begins to run when the Plaintiff knows, or through the exercise of reasonable diligence should know, that he or she has been injured from the exposure. R.C. §2305.10; *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 90, 447 N.Ed.2d 727.[10]

The majority cites, at p. 15, *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St. 3d 59, 609 N.E.2d 140, even though the reasoning of that case mitigates against the decision here. In *Burgess* the court held the discovery rule set forth in R.C. §2305.10 to be unconstitutional as applied to a plaintiff alleging injury from DES exposure. R.C. §2305.10 provided that a cause of action for bodily injury due to DES exposure arises when the plaintiff learns he has an

---

[10] With the exceptions of latent disease and malpractice cases, we are unaware of instances where a discovery rule has been judicially read into the statutes of limitation of this state. *See Shover v. Cordis Corp.* (1991), 61 Ohio St. 3d 213, 218, 574 N.E.2d 457 ("The discovery rule has traditionally been limited by case law to malpractice actions where the plaintiff in such actions may remain unaware of his or her injuries until some time in the future"). Those exceptions have all involved situations where the statute would otherwise begin running even though the plaintiff did not know, and had no reason to believe, he or she had even been injured. That is clearly not the case here. Thus, by applying a discovery rule in a non-latent bodily injury action, the majority opens up *all* general negligence claims to a discovery rule.

injury which "may be related" to that exposure. In contrast, causes of action for latent diseases due to other exposures arise under §2305.10 when the plaintiff learns he "has been injured" by the exposure. The Court in *Burgess* reasoned that §2305.10's disparity in treatment of DES plaintiffs, giving them a more restrictive statute of limitations unlike any other in the Ohio Revised Code, was a violation of due process.

The majority's discovery rule here is a defendant's version of the statutory provision deemed unconstitutional in *Burgess*. The decision applies a much *less* restrictive statute of limitations for the claims brought against SEMC (and other hospitals) than that applied to any other tort defendant in the Ohio Revised Code or the decisional law of this state. Absolutely no rationale is given for this disparate treatment. Accordingly, SEMC's rights to due process and equal protection of the laws have been violated.

IV. THE INABILITY OF HOSPITALS AND OTHER PEER REVIEW PARTICIPANTS TO DEFEND CLAIMS OF NEGLIGENT CREDENTIALING.

The majority finds that the immunity provisions of R.C. §2305.25 are inapplicable to a hospital sued by a former patient for the actions or omissions of its peer review committees.[11] Since it is impossible to reasonably

---

[11] The immunity issue was not properly before the Court and therefore should not have been decided. It was not raised at all in the trial court, nor was it addressed by the court of appeals. SEMC and amicus curiae, the Ohio Hospital

construe the statute any other way, the majority decision also means that those who serve on peer review committees have no immunity from patient suits claiming negligent credentialing. These findings, considered in conjunction with the statutory prohibitions of R.C. §§2305.25 and 2305.251, violate SEMC's (and all peer review participants) rights to due process under the Ohio and U.S. Constitutions.

Due process requires that there be an opportunity to present every available defense. *Lindsey v. Normet* (1972), 405 U.S. 56, 66. A hospital (or any participant of a peer review committee) faced with an action for negligent peer review, however, is absolutely forbidden from presenting a defense that it acted reasonably in credentialing the physician in question. Plaintiffs may allege failures to act on the part of peer review committees and their individual members but the hospital and peer review participants are helpless to respond. R.C. §2305.251 provides, in pertinent part:

> Proceedings and records of all review committees described in section 2305.25 of the Revised Code shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional, a hospital, or not-for-profit health care corporation which is a member of the hospital or of which the hospital is a member, or

---

Association, made passing reference to the immunity provision in R.C. §2305.25, but the issue was *never* fully briefed or argued. *See Mitchell* main briefs, SEMC's at p. 35, fn 10 and OHA's at p. 9, fn 5.

> other health care institution arising out of matters which are the subject of evaluation and review by the committee. *No person* in attendance at a meeting of a review committee or serving as a member of a review committee *shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof.* (Emphasis added)

In other words, in attempting to defend a negligent credentialing claim, a hospital and the members of its peer review committees cannot offer any evidence as to what they *actually* did to peer review the physician or what they knew or did not know in reaching that credentialing decision.[12] Recognizing the conflict between this absolute privilege and the possibility of civil liability to allegedly aggrieved patients or staff physicians, the Ohio legislature chose to grant unqualified immunity to hospitals and peer review committee members for "any acts, omissions, decisions, or other conduct within the scope of the functions of the committee." R.C. §2305.25; Ohio Legislative Service Commission, Summary of Enactments (copy attached) at p. 151. The majority opinion revives this conflict and, in so doing, violates the due process rights of SEMC.

---

[12] The majority cites only the "otherwise available" caveat at the end of the statute (opinion at p. 19). The purpose of that caveat, obviously, is to prevent the use of the peer review privilege to shield otherwise discoverable documents simply by submitting them to peer review committees.

V. RETROACTIVE APPLICATION OF THE COURT'S NEW DISCOVERY RULE

For the past several decades, SEMC and participants on its peer review committees have engaged in this difficult, controversial task secure, at least, with the knowledge that their potential liability for peer review decisions was finite in time. Whether construed as malpractice or simple negligence, the negligent credentialing claims of both Plaintiffs here, Coney Mitchell and Jimmie Dean Browning, accrued (or arose) and expired before Plaintiffs filed their actions under any and all previous interpretations of R.C. §§2305.11(A) or (B) and §2305.10.

The majority now announces a new discovery rule specifically tailored for negligent credentialing claims against hospitals. That this ruling was an entirely unforeseeable break from prior law is evident from the fact that Plaintiffs, themselves, *never* advocated this position (until after the court of appeals devised this rule on its own). The retroactive application of this new discovery test here to revive the expired claims of Plaintiffs, however, would violate SEMC's right to due process under the Fourteenth Amendment of the U.S. Constitution.

The U.S. Supreme Court has said of statutes of limitation;

> Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time, and that "the right to be free from stale

> claims in time comes to prevail over the right to prosecute them." (Citations omitted)

United States v. Kubrick (1979), 444 U.S. 111, 117 (rejecting the proposition that a claim under the Federal Tort Claims Act accrues only when the plaintiff becomes aware his injury was negligently inflicted); *See also Chase Securities Corp. v. Donaldson* (1945), 325 U.S. 304, 314; *Cox v. Ohio Department of Transportation* (1981), 67 Ohio St. 2d 501, 4[illegible]1 N.E. 2d 597.

It follows that the expiration of a statute of limitations has a two-fold effect: (1) the prospective plaintiff loses a remedy for his alleged injury; and (2) a potential defendant acquires a vested right to be free from further litigation. It is respectfully submitted that when a statute of limitations expires, a vested right to be free from further litigation arises and that right is protected by the due process clause of the Fourteenth Amendment of the United States Constitution. *See Goss v. Lopez* (1975), 419 U.S. 565.

In this case, SEMC, and those who served on its peer review committees, were granted a right to be free from further claims by Plaintiffs by the Ohio General Assembly. This right vested long ago when the prevailing interpretation of the statute of limitations brought an end to Plaintiffs' right to seek a remedy. Accordingly, SEMC cannot be deprived of this vested right to be free from suit without violating its guarantee to due process under the U.S. Constitution.

The unfairness of any retroactive application of the majority's new discovery rule is clearly revealed when

tested by the factors the U.S. Supreme Court has established for non-retroactive application of judicial decisions altering statutes of limitations. In *Chevron Oil v. Huson* (1971), 404 U.S. 97, the Court set forth three factors to be considered in deciding whether a judicial decision may be applied nonretroactively only:

> First the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, . . .

Id. at 106-107 (citations omitted). According to *Chevron,* the factors to be considered in determining whether a decision only can be applied nonretroactively are: a) does the decision establish a new principle of law; b) is the purpose of the new decisional rule helped or hindered by retroactive application; and c) will retroactive application of the new decisional rule result in great inequity?

Consideration of these factors, particularly a and c, clearly weigh against retroactive application of the new discovery rule. It obviously establishes a new principle of law. Why else did the Plaintiffs never argue the proposition? Similarly, none of the trial courts who granted summary judgment in a dozen similar cases envisioned such a rule, nor did the court of appeals which affirmed a

grant of summary judgment on the statute of limitations in one case prior to issuing its decision in *Browning*. *See Hanks v. Burt* (Jan. 25, 1991), Montgomery Ct. App. No. 12257 at Appendix of SEMC's Brief in *Browning* at pp. 35a-40a.

The inequity of retroactive application here is also readily apparent. At the time Dr. Burt was peer reviewed relevant to Plaintiffs' surgeries, no hospital or participant of a peer review committee could have predicted that a decade later the traditional interpretations of R.C. §§2305.11 and 2305.10 would be abandoned and they would be subject to suit virtually any time into the indefinite future.

This situation is strikingly similar to that presented in *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U.S. 673. In *Brinkerhoff-Faris* the plaintiff brought suit in a Missouri court to defend against a tax assessment. On appeal, the Supreme Court of Missouri overruled the prior well-established rule that the state tax board had no jurisdiction to hear appeals, and held that plaintiff was not entitled to relief because it had failed to exhaust its newly created administrative remedies. *Id.* at 675.

The Court in *Brinkerhoff-Faris* held that the Missouri court's holding violated due process of law because plaintiff was denied an opportunity to defend against the tax assessment. It held that such a denial amounts to a deprivation of property without due process of law. *Id.* at 679.

The well-reasoned analysis in *Brinkerhoff-Faris* is persuasive in the present case. *See also Chevron*, 404 U.S. at 108-109 (holding that application of one year statute of

limitations to claim under the Lands Act would not be retroactive because ruling could not be foreseen and would cause substantial inequitable results). Here, any retroactive application of the decision changes well-established law with respect to the statute of limitations. Until this case, there was no reason to preserve records, keep track of witnesses, or otherwise stand ready to defend credentialing decisions of many years past because potential claims were barred under any known interpretation of the statute of limitations. In other words, this decision has the effect of reviving claims which may no longer be defensible.

Although this new class of defendants may have the opportunity to appear in court, their ability to defend themselves has been effectively extinguished. The deprivation of any meaningful opportunity to defend oneself constitutes an unwarranted denial of due process of law.

VI. PREJUDGING THE MERITS OF THESE CASES

The decision in this case was obviously a close and difficult one, witness the 4-3 vote. Fairness to SEMC requires that the decision be based upon the law and not upon emotion or a preconceived notion of how the cases should be resolved on the merits. *E.g. In re Reiner* (1991), 74 Ohio App. 3d 213, 218, 598 N.E.2d 768 (due process under the Ohio and U.S. Constitutions entitles a litigant to have his case heard by an impartial arbiter).

The language of the majority opinion suggests a prejudging of the merits of these cases. Although acknowledging these cases were not before the Court on the merits,[13] the majority opinion states as follows:

> In reaching our conclusions, we do not pass judgment (since issues of alleged liability are to be determined) on Dr. Blue or SEMC, although it is tempting to do so given what the record shows has happened to these two women. Perhaps now they, and others, will have their day in court, *where the conspiracy of silence in the local medical community which permitted the atrocities to be committed,* and the atrocities themselves, can be more fully explored.

Opinion at p. 21 (emphasis added).

Given the foregoing pronouncement, SEMC certainly may question whether the decision was reached solely upon an impartial interpretation of the law and facts before the Court. The record below does not raise the issue or support the apparent conclusion that there was a "conspiracy of silence in the local medical community."[14]

---

[13] The record properly before this Court consisted of the depositions of the female Plaintiffs and the summary judgment and appellate court briefings on the statute of limitations issues. No merit issues were addressed below, nor would the scant record as to the merits support any such resolution.

[14] In point of fact, a jury has heard the merits on one of the similar cases pending in Montgomery County and effectively rejected the notion of a "conspiracy of silence." After a seven-week trial, that jury rendered an unanimous verdict in SEMC's favor on the claim of fraudulent concealment. *Phillips v. Burt* (June 21, 1991), No. 86-1004 (a copy of the verdict slip is attached hereto as Exhibit C).

The characterization of Plaintiffs' injuries as "atrocities" and the suggestion that others (whose cases are not before the Court) have also suffered "atrocities" is also disconcerting. An atrocity is an atrocious act. Atrocious is defined as "extremely or shockingly wicked, cruel, or brutal." The Random House College Dictionary, 1st Edition, 1980. Again, the record below provides no basis or reason for reaching such a conclusion[15], particularly as to SEMC or the Montgomery County medical community.

In *State, ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 471, 132 N.E.2d 191, this Court observed:

> The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.

(*citing Haslam v. Morrison, Judge*, 113 Utah 14, 20, 190 P.2d 520, 523). Moreover, Chief Justice Moyer recently emphasized the importance of "avoiding even the *appearance* of any bias or prejudice . . . to ensure the absolute confidence of the parties and the public in the fair and impartial resolution of all matters." *State v. Warner* (July 8, 1991), Ohio Sup. Ct. No. 91-AP-110 (copy attached as Exhibit D) at p. 2 (emphasis added).

---

[15] In the *Browning* case, in fact, the record raises a substantial question as to whether Ms. Browning was even malpractice by her physicians. An attorney who reviewed her claim in 1988 refused to take her case, stating "I could not find a basis for a malpractice claim for your kidney and bladder problems." (Rec. at 176).

Given the language in the conclusion of the majority opinion, SEMC's confidence has reasonably been shaken as to whether it received a fair and impartial resolution of this matter. The majority opinion's concluding statement that there has been a "conspiracy of silence" in the medical community and "atrocities" committed, without doubt, gives at least the *appearance* that the merits have been prejudged.[16] This "taint of suspicion" strongly suggests a need for rehearing.

A rehearing is also necessary to modify the majority's opinion and delete the offending language. Otherwise, plaintiffs will argue on remand that these conclusions constitute law of the case. These remarks will also be frequently cited by plaintiffs in other cases for the proposition that SEMC and the Montgomery County medical community are liable as a matter of law. Surely this was not intended by the Court, but that is a potential result of the majority's opinion if left unchanged.

VII. CONCLUSION

For the reasons set forth above, SEMC respectfully urges the Court to grant a rehearing in this matter.

---

[16] Notably, the majority's opinion can only have the effect of promoting "conspiracies of silence" in the future. Given the liability risks created by this decision, peer review committee members will be further inclined not to speak and to withhold information.

Respectfully submitted,

/s/ K.C. Green

Frank C. Woodside, III (0000636)
John E. Schlosser (0007831)
K. C. Green (0005435)
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202-3172
(513) 977-8200
Attorneys for Defendant-Appellant,
St. Elizabeth Medical Center

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following, by first-class U.S. mail, this 12th day of July 1993:

Neil F. Freund, Esq.
Freund, Freeze & Arnold
1800 Dayton Arcade Center
1 South Main Street
Dayton, Ohio 45402

John G. Lancione, Esq.
Spangenberg, Shibley,
Traci & Lancione
1500 National City Bank Bldg.
Cleveland, Ohio 44114-3062

James Hughes, Esq.
Bricker & Eckler
100 S. 3rd Street
Columbus, Ohio 43215

K.C. Green

BROWNING ET AL., APPELLEES, *v.* BURT;
BLUE ET AL., APPELLANTS.

MITCHELL, APPELLEE, *v.* BURT;
ST. ELIZABETH MEDICAL CENTER, APPELLANT.

[Cite as *Browning v. Burt* (1993), 66 Ohio St.3d 544.]

Courts – Limitation of actions – Hospital negligence arising out of "care" of a patient is a "medical claim" within meaning of R.C. 2305.11(D)(3) and subject to period of limitations set forth in R.C. 2305.11(B)(1) – Negligent credentialing of a physician by hospital is not "medical diagnosis, care or treatment" within meaning of R.C. 2305.11 – Action against hospital for bodily injury arising from negligent credentialing of physician subject to two-year limitations period in R.C. 2305.10 – Limitations period in R.C. 2305.10 commences to run, when – R.C. 2305.25 does not provide hospital with immunity for negligence in granting or continuing staff privileges of an incompetent physician.

[*Syllabus by the Court*]

1. Hospital negligence arising out of the "care" of a patient is a "medical claim" within the meaning of R.C. 2305.11(D)(3) and is subject to the period of limitations set forth in R.C. 2305.11(B)(1). "Care" as used in R.C. 2305.11(D)(3) is the prevention or alleviation of a physical or mental defect or illness.

2. Negligent credentialing of a physician by a hospital is not "medical diagnosis, care, or treatment" within the meaning of R.C. 2305.11.

3. An action against a hospital for bodily injury arising out of the negligent credentialing of a physician is subject to the two-year limitations period set forth in R.C. 2305.10.

4. The period of limitations set forth in R.C. 2305.10 commences to run when the victim knows or should have discovered that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.

5. R.C. 2305.25 does not provide a hospital with immunity from liability for the hospital's negligence in granting and/or continuing the staff privileges of an incompetent physician.

(Nos. 91-2079 and 91-2121 – Submitted January 20, 1993 – Decided June 30, 1993.)

APPEALS from the Court of Appeals for Montgomery County, Nos. 12176 and 12244.

The two cases before us today are representative of many actions filed in Montgomery County relating to the drastically unconventional surgical practices of Dr. James C. Burt during his former service at St. Elizabeth Medical Center ("SEMC") in Dayton. Case No. 91-2079 involves the timeliness of claims asserted against SEMC for its alleged negligence in having granted and/or continued the staff membership or professional privileges of Dr. Burt and another former member of the SEMC medical staff, Dr. Max Blue, Jr.[1] This case also includes a claim for loss of consortium. Case No. 91-2121 involves the timeliness of a negligence action against SEMC for continuing Dr. Burt's staff membership or professional privileges at

---

[1] These claims are referred to by the parties as claims for "negligent credentialing."

the hospital. The two cases have been consolidated *sua sponte* for decision. See (1992), 62 Ohio St.3d 1502, 583 N.E.2d 973.

Case No. 91-2079

On April 17, 1989, Jimmie Dean Browning ("Browning") and her husband, Lawrence Browning, appellees, filed a complaint in the Court of Common Pleas of Montgomery County against Dr. Burt and appellants, SEMC and Dr. Blue. Browning alleged that in February 1982, Drs. Burt and Blue negligently, willfully and wantonly performed unnecessary and experimental "vaginal reconstruction surgery" upon her without her consent, restructuring her genital organs to an unnatural and bizarre anatomical configuration. Browning alleged that she was advised by Blue that the surgery was necessary to treat a bladder condition. Browning also alleged that Blue negligently performed a total of sixteen unnecessary surgeries upon her between January 1981 and August 1986. Browning asserted that SEMC negligently, intentionally, and willfully permitted Drs. Burt and Blue to perform the unnecessary and experimental surgeries at SEMC by failing to provide adequate peer review of Drs. Burt and Blue, and by failing to protect Browning from known incompetent medical care.

In her complaint, Browning sought recovery against Drs. Burt and Blue for medical malpractice. She sought recovery against SEMC for its alleged negligence in granting and/or continuing the staff membership or professional privileges of Drs. Burt and Blue. Lawrence

Browning sought recovery against all defendants for loss of consortium.

Dr. Burt failed to respond to the complaint and, upon motion, appellees obtained a default judgment against him.[2] SEMC and Dr. Blue, appellants, answered the complaint and asserted defenses based upon the "applicable statute of limitations." Appellants then deposed Browning in July 1989 for purposes of developing their statute of limitations defenses. The following relevant matters can be gleaned from Browning's deposition testimony.

In 1980, Browning sought treatment from Dr. Blue, a urologist, for bladder infections and difficulties she experienced voiding urine. Blue performed surgery upon Browning, but Browning's condition did not improve. By 1982, Browning began complaining of constant bladder pain. She also complained of pain she experienced during sexual relations with her husband. Thus, in February 1982, Blue referred her to Dr. Burt for an "exploratory pelvic laparotomy with lysis" and "vaginoplasty."

Dr. Burt met with Browning prior to surgery. Burt explained to Browning that the pain she experienced during sexual relations was caused by her husband's penis striking her bladder. Burt explained that Drs. Burt and Blue would perform surgery to place her bladder upon a "pedestal," and that this procedure would correct her problems voiding urine and alleviate the pain she suffered during intercourse. Burt, also indicated that he

---

[2] A hearing for the assessment of damages was held in abeyance pending further court order.

would do some "cosmetic things" to improve Browning's sex life.

With respect to this special surgical procedure Burt performed at SEMC, a form letter was required by SEMC to be submitted to Burt's patients prior to surgery. A copy of the letter bearing Browning's signature (and a "witness" signature dated February 5, 1982) was presented by SEMC at Browning's deposition.[3] Browning testified that she could not recall having ever seen the letter. The form letter, which bears the SEMC letterhead, states:

"Dear Patient:

"The Executive Committee of the Medical Staff of St. Elizabeth Medical Center wishes to inform you that the 'female coital area reconstruction' surgery you are about to undergo is:

"1. Not documented by ordinary standards of scientific reporting and publication.

"2. Not a generally accepted procedure.

"3. As yet not duplicated by other investigators.

"4. Detailed only in non-scientific literature.

"You should be informed that the Executive Committee of the Medical Staff considers the aforementioned

---

[3] It is undisputed that the letter bearing Browning's signature appeared in her hospital records at SEMC.

procedure an unproven, non-standard practice of gynecology."[4]

Drs. Burt and Blue performed "vaginal reconstruction surgery" upon Browning at SEMC in February 1982. Browning testified at the deposition that she underwent the surgery explained to her by Burt to correct her painful bladder condition.[5]

Browning was required to employ an indwelling urinary catheter for six months following the reconstruction surgery. When the catheter was removed by Dr. Burt, Browning could not void properly and became "obstructed." The obstruction caused extreme pain and vomiting and subsequent hospitalization at SEMC. Browning testified that after her February 1982 "love surgery," she continued to suffer from bladder infections and developed

---

[4] An identical form letter appears in the record in case No. 91-2121. Answers to interrogatories in that case reveal that this "special Burt consent" form was used by SEMC beginning in 1979 in connection with Dr. Burt's "vaginal reconstruction surgeries." The forms were provided to Burt by SEMC and were required to be completed before or at the time of hospital admission. Burt began conducting vaginal reconstruction surgeries at SEMC in 1969.

[5] The parties to this appeal agree that the surgery actually performed upon Browning consisted of an exploratory pelvic laparotomy, vaginal reconstruction, circumcision of the clitoris and insertion of a urinary catheter. The vaginal reconstruction consisted of, among other things, a redirection and elongation of her vagina. In her deposition, Browning claimed that she was not fully informed of the true nature of the surgery, although she admitted that her signature appeared on a consent form indicating that the surgical procedure "Pelvic Laparotomy, Vaginal Reconstruction" had been explained to her satisfaction.

problems with urinary incontinence. Her bladder infections after the surgery were worse (more frequent) than before. Additionally, following the surgery, Browning could not engage in sexual relations without extreme pain and difficulties. At some point, she also began to develop severe kidney problems, for which Dr. Blue provided treatment. Browning was last treated by Dr. Burt sometime in 1983. Burt left Browning a message that he was leaving town and that she need not see him anymore. Browning continued her treatment at SEMC with Dr. Blue.

Browning underwent myriad of additional surgeries performed by Dr. Blue at SEMC between 1982 and 1986. After each surgery, Dr. Blue told Browning that after the *next* surgery, she would be "just fine." The final surgery performed by Blue occurred on August 22, 1986, when he removed Browning's right kidney. However, none of these surgeries improved Browning's condition. Indeed, Browning stated that her condition worsened. She continued to suffer bladder infections, difficulties voiding, problems during sexual intercourse, and periods of urinary incontinence. She also developed bowel problems sometime during her treatment with Burt and/or Blue. After the August 22, 1986 surgery, Browning began experiencing right flank pain, and her mental health deteriorated.

When her problems persisted, Browning arranged to be examined by Dr. Montague, a urologist, at the Cleveland Clinic. Browning went to see Montague for an explanation why her medical condition did not improve following Dr. Blue's August 1986 surgery. Montague

examined Browning in June 1987 and, according to Browning:

"A. He told me that I was voiding pretty good and that he thought that I should go for some counseling because I wasn't willing to accept my condition or change my life-style or something. * * *

"Q. What did you tell Dr. Montague?

"A. I told him that I thought that something was wrong, you know, from the surgery I'd had, that I didn't get over it and when he [Blue] took my kidney out, I thought I wouldn't have any more problems."

In June or July 1987, Montague sent a report of his examination to Browning and Blue. According to Browning, the report indicated there was a "flaw" in her surgery. Browning, who underwent approximately sixteen surgeries, did not know the surgery to which Dr. Montague was referring. She never questioned Montague about the report.

Sometime between July and August 1987 (but after receiving the report from Cleveland Clinic), Browning confronted Dr. Blue in Blue's office. Browning told Blue that she thought Blue "had done a malpractice operation" because her medical condition was not improving. She also told Blue that before Dr. Burt left town in 1983, Burt had told Browning that half of Browning's prior surgeries were malpractice. Browning had had a number of surgeries before she last saw Burt in 1983 (including a number of surgeries not performed by Burt or Blue), but Browning assumed that Burt was referring to Blue's prior surgeries. Browning said that during the confrontation at

Blue's office, Blue denied any wrongdoing and recommended that she see a psychiatrist.

At Blue's suggestion, Browning entered SEMC for psychiatric treatment in August 1987 under the care of Dr. Patwa. According to Browning, Blue visited her at the hospital "because he wanted me to forget everything that letter said from Cleveland Clinic and I told him he was a liar." Blue tried to prescribe medication for Browning during this time, but Dr. Patwa would not allow it. Browning stated in her deposition that she began to suspect in August 1987 that Dr. Blue may have committed malpractice upon her. Browning never returned to see Dr. Blue for treatment after her August 1987 hospitalization. Browning told Dr. Patwa in August or September 1987 that Dr. Blue had ruined her life because Blue removed her kidney and she was not well, and never would be well.[6]

On September 29, 1989, SEMC filed a motion for summary judgment, arguing that appellees' claims against SEMC, all of which arose from SEMC's alleged negligent credentialing of Drs. Burt and Blue, were time-barred by the one-year statute of limitations set forth in

---

[6] Browning testified at the deposition that she continues to suffer from urinary incontinence, abdominal flank pain, severe bowel problems, severe anxiety and depression, chronic back pain, and pain during sexual intercourse to the point that she is virtually unable to participate in sexual relations with her husband. She testified that she was told by a gynecologist two months before the deposition that the surgery performed upon her could not be corrected, and that Dr. Burt "had cut away everything."

R.C. 2305.11(B)(1). Relying upon portions of the deposition testimony, SEMC argued, citing *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93, that the statute began to run by August 1987 at the latest when "cognizable events" occurred which should have led Browning to believe that her condition was related to her previous treatments with Burt and Blue, and which should have alerted Browning of the need to pursue her remedies. On November 3, 1989, Blue moved for summary judgment on Browning's malpractice claim and Lawrence Browning's consortium claim. For reasons similar to those advanced by SEMC, Blue argued that appellees' claims against him were barred by R.C. 2305.11(B)(1).

Appellees responded to each motion for summary judgment and submitted an affidavit by Browning. The affidavit submitted in response to SEMC's motion (which is similar to the one submitted in response to Blue's motion) provides, in part:

"I saw the television program West 57th Street on October 30, 1988. I had the same symptoms as Dr. Burt's patients, which were on that show, complained of.

"I had surgery performed by Dr. Burt and Dr. Blue, and I wanted to know whether they had performed experimental surgery on me.

" * * *

"I did not know or believe prior to seeing the West 57th Street program, that the surgeries performed on me by Dr. Blue and Dr. Burt were unnecessary and/or experimental."

The trial court granted the motions for summary judgment and dismissed the action against SEMC and Blue.[7] The trial court held that appellees' claims accrued in August 1987 at the latest when Browning knew of Dr. Montague's report, knew of the continued and/or worsened nature of her condition, and told Blue that Blue had committed a "malpractice operation." The trial court held that under *Allenius, supra,* appellees were placed on notice (by a "cognizable event") in August 1987 to pursue any possible claims against SEMC and Blue, and because appellees did not do so within the one-year period of limitation, R.C. 2305.11 barred the action. By entry dated April 4, 1990, the trial court expressly determined that there was "no just cause for delay" of an appeal from the dismissals of the action against SEMC and Blue, leaving only the damages on appellees' default judgment against Dr. Burt to be adjudicated.

On appeal, the court of appeals reversed the judgment of the trial court with respect to the dismissal of appellees' claims against SEMC. Applying the R.C. 2305.11(B)(1) statute of limitations, and the "cognizable event" test of *Allenius,* the court of appeals held that there was no evidence that appellees knew or should have known, prior to viewing the "West 57th" television program, that Browning may have been injured as a result of

---

[7] The trial court granted SEMC's motion by decision dated December 5, 1989. All claims against SEMC were dismissed by entry dated January 3, 1990. The trial court granted Blue's motion by decision dated February 2, 1990, and the action against Blue was dismissed on March 6, 1990. The trial court's decisions granting SEMC's motion and Blue's motion are nearly identical.

SEMC's negligence in credentialing Drs. Burt and Blue. Accordingly, the court of appeals held that summary judgment was inappropriate, as appellees' causes of action against SEMC may not have accrued until October 1988, and thus, the action against SEMC (commenced in April 1989) may have been timely filed.

The court of appeals affirmed the judgment of the trial court with respect to the dismissal of Browning's malpractice claim against Blue, finding that the cause of action accrued in August 1987 at the latest when Browning knew or should have known that she may have been the victim of medical malpractice. However, the court of appeals reversed the judgment of the trial court with respect to the dismissal of Lawrence Browning's consortium claim against Blue, finding that Lawrence's claim was governed by the four-year statute of limitations set forth in R.C. 2305.09.

Case No. 91-2121

Coney Mitchell, appellee, underwent "vaginal reconstruction surgery" performed by Dr. Burt at SEMC in January 1985. Prior to surgery, Mitchell suffered from urinary incontinence, bladder infections, bladder and pelvic pain, vaginal infections, bowel problems, and painful sexual intercourse. Before surgery, Burt explained to Mitchell that her bladder was being bruised during sexual relations with her husband, and that surgery was necessary to "lift" her bladder "out of the way." Burt told Mitchell that the surgical procedure would alleviate her pelvic pain and correct her bladder problems. Mitchell

signed a consent form for "Anterior Colporrhaphy, Vaginal Reconstruction Cystoscopy." She also apparently signed the special form letter required by SEMC for Burt's vaginal reconstruction surgeries.[8]

Mitchell's condition worsened within a short time after the surgery.[9] When the catheter was removed, Mitchell lost all bladder control. Her bladder pain and vaginal infections continued. She also began to experience severe bowel problems and felt like everything inside of her was "tearing loose." She "stayed sick," and her condition never improved.

At Dr. Burt's urging, Mitchell and her husband attempted to resume sexual relations approximately four months after the reconstruction surgery. However, penetration was impossible and Mitchell began bleeding profusely. At this time, Mitchell examined her vagina and noticed that it had been "sewn up." She immediately contacted Burt, who indicated that everything was normal, and that she needed time to heal. Burt instructed Mitchell not to see any other doctor. He told Mitchell that any other doctor could cause her to bleed to death. Thus, Mitchell continued treatments with Dr. Burt.

---

[8] The contents of the form letter appear in the facts in case No. 91-2079, *supra*. It is undisputed that the letter bearing Mitchell's signature appeared in her hospital file at SEMC.

[9] We surmise from the record that the procedure Mitchell underwent was similar to the surgery performed upon Browning, which included, among other things, vaginal redirection and elongation, insertion of a urinary catheter, and a general restructuring of body organs, muscle and tissue. See fn. 5, *supra*.

During subsequent treatments, Burt continually insisted that Mitchell could resume normal sexual relations with her husband. However, Mitchell maintained that this was not possible. At some point, Burt met with Mitchell's husband and told him that Mitchell would get better, and he (Mitchell's husband) should not "take no for an answer." Eventually, in 1987, Mitchell had a heated argument with Burt and decided to terminate her treatment with him. Mitchell has never been able to resume sexual relations with her husband.

In October 1988, Mitchell viewed the "West 57th" television program regarding Dr. Burt's surgical practices. She realized that her symptoms were the same as those discussed by Burt's ex-patients appearing on the show. Thus, Mitchell contacted a doctor, Dr. Busacco, whose name she obtained from watching the program. Mitchell was examined by Busacco in December 1988. Busacco performed whatever corrective surgery was possible – reinforcing the rectum, reconstructing the vagina, removing pockets of urine which had been collecting bacteria within the urinary system – but Busacco informed Mitchell that she had been surgically mutilated.

Mitchell commenced suit on December 14, 1988 against Dr. Burt and appellant, SEMC. Mitchell alleged that Burt negligently and fraudulently performed inappropriate, unnecessary and experimental surgery upon her without her knowledge and consent. Mitchell alleged that SEMC knew of Burt's surgical practices and failed to protect her from a known incompetent physician. Mitchell also claimed that SEMC was negligent in failing to provide adequate peer review of Dr. Burt.

Mitchell sought recovery from Dr. Burt for medical malpractice. She sought recovery from SEMC for its alleged negligence in granting and continuing hospital privileges to Dr. Burt.

SEMC responded to the complaint and eventually moved for summary judgment on the basis of the R.C. 2305.11(B)(1) statute of limitations. Burt failed to answer (or defend against) the claim of medical malpractice.

The trial court granted SEMC's motion for summary judgment. In its decision, the trial court noted that SEMC and Mitchell apparently assumed that all claims against SEMC were "medical claims" within the meaning of R.C. 2305.11(B)(1) and (D)(3). Applying *Allenius, supra,* the trial court held that the R.C. 2305.11(B)(1) period of limitations began to run in December 1985 at the latest. However, it is apparent that the trial court was unsure whether R.C. 2305.11(B)(1) was applicable. In dismissing the action against SEMC, the trial court stated, in part:

"The Court finds that an action upon a medical claim against St. Elizabeth Medical Center was not commenced within one year after the action accrued and therefore under R.C. 2305.11(B)(1) the claims should be DISMISSED. The Court further finds that the claims of the Plaintiff for bodily injury not related to a medical claim must be DISMISSED because the action was not brought within the two years after the cause thereof arose pursuant to R.C. 2305.10. This case was filed December 14, 1988."

Subsequently, the trial court entered a default judgment against Burt and in favor of Mitchell. By separate entry, the trial court expressly determined that there was

"no just cause for delay" of an appeal from the dismissal of the action against SEMC.

On appeal, the court of appeals reversed the judgment of the trial court. The court of appeals determined that there was nothing in the record to suggest that Mitchell should have discovered the alleged negligence of SEMC prior to viewing the "West 57th" television program in October 1988. Accordingly, the court of appeals, relying on its decision in the *Browning* case, held that summary judgment was not appropriate.

The two cases, having been consolidated, are now before this court pursuant to the allowance of motions to certify the record.

Spangenberg, Shibley, Traci, Lancione & Liber, John G. Lancione, John D. Liber and *Peter H. Weinberger,* for appellees Browning in case No. 91-2079 and appellee Mitchell in case No. 91-2121.

Freund, Freeze & Arnold, Neil F. Freund and *Robert N. Snyder,* for appellant Max Blue, Jr., M.D., in case No. 91-2079.

Dinsmore & Shohl, Frank C. Woodside III, John E. Schlosser and *K.C. Green,* for appellant St. Elizabeth Medical Center in case Nos. 91-2079 and 91-2121.

Bricker & Eckler, James J. Hughes and *Catherine M. Ballard,* urging reversal for *amicus curiae,* Ohio Hospital Association, in case Nos. 91-2079 and 91-2121.

Douglas J. The narrow issue in these consolidated cases is whether the negligent credentialing causes of action against SEMC for granting and continuing staff privileges to Dr. Burt (and Dr. Blue in case No. 91-2079) were timely filed pursuant to the applicable statute of limitations. Case No. 91-2079 involves additional issues concerning the court of appeals' reinstatement of Lawrence Browning's consortium claim against Dr. Blue and SEMC.[10] Given the procedural disposition of these cases, the pertinent facts (where applicable) must be construed in a light most favorable to appellees who opposed the motions for summary judgment at the trial court level. See Civ.R. 56.

I

Hospital Liability/Negligent Credentialing

SEMC appeals in both cases, urging that the claims asserted against it for negligent credentialing are time-barred by R.C. 2305.11(B)(1). Specifically, SEMC suggests that the court of appeals erred in determining that discovery (by appellees Mitchell and Browning) of the hospital's negligence was necessary to commence the running of the R.C. 2305.11(B)(1) period of limitations on the negligent credentialing claims. SEMC asserts that the

---

[10] The malpractice of Dr. Burt has been established in both cases by virtue of the default judgments entered against him even *if* the causes of action for malpractice against Dr. Burt were untimely filed. Browning did not appeal to this court from the determination that her malpractice action against Dr. Blue was untimely filed and, thus, the judgment of the court of appeals on that issue is final.

"cognizable events" triggering the running of the statute of limitations on Mitchell's and Browning's medical malpractice claims against the doctor(s) were sufficient to commence the running of the period of limitations on their negligent credentialing causes of action against the hospital.

In support of its position, SEMC cites *Allenius, supra,* and a number of our other cases such as *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 5 OBR 247, 449 N.E.2d 438, *Richards v. St. Thomas Hosp.* (1986), 24 Ohio St.3d 27, 24 OBR 71, 492 N.E.2d 821, *Hoffman v. Davidson* (1987), 31 Ohio St.3d 60, 31 OBR 165, 508 N.E.2d 958, *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204, and *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284. This line of cases deals with the accrual of causes of action for *medical malpractice* under R.C. 2305.11, and the necessity of investigation and pursuit of remedies when a medical condition and its relationship to a previous medical procedure, treatment or diagnosis are "discovered."

Conversely, appellees contend that under *Allenius, supra,* the "West 57th" television program was the "cognizable event" which commenced the running of the R.C. 2305.11(B)(1) period of limitations on the negligent credentialing causes of action. Thus, appellees assert that Mitchell's and Browning's claims against SEMC were filed within the R.C. 2305.11(B)(1) period of limitations.

Upon reflection, we cannot accept either of the parties' positions, which assume that R.C. 2305.11(B)(1) and our cases governing the accrual of causes of action for

medical malpractice apply to claims of hospital liability for negligent credentialing.

The theory of hospital liability at issue in these cases was discussed at some length in *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 257-260, 553 N.E.2d 1038, 1044-1047. In *Albain*, paragraph two of the syllabus, this court held that:

"In regard to staff privileges, a hospital has a *direct duty* to grant and to continue such privileges only to competent physicians. * * * In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured." (Emphasis added.)

The general duty imposed upon hospitals to grant and continue staff privileges only to competent physicians was identified in *Albain* as an "independent" duty of care owed *directly* to those admitted to the hospital. *Id.* at 257-260, 553 N.E.2d at 1044-1047. See, also, *Taylor v. Flower Deaconess Home & Hosp.* (1922), 104 Ohio St. 61, 135 N.E. 287. One of the areas in which the hospital owes the independent and direct duty to a patient is in establishing (and adhering to) reasonable peer review procedures:

" * * * [O]nce a competent and careful physician has been granted staff privileges, the hospital will not thereafter be liable unless it had reason to know that the act of malpractice would most likely take place. That is, where a previously competent physician with staff privileges develops a pattern of incompetence, which the hospital

should become aware of through its peer review process, the hospital must stand ready to answer for its retention of such physician." (Footnote omitted.) *Albain*, 50 Ohio St.3d at 258, 553 N.E.2d at 1045.

In addition, the majority in *Albain* quoted with approval the following statement:

"' * * * [A hospital] is not required to pass upon the efficacy of treatment; it may not decide for a doctor whether an operation is necessary, or, if one be necessary, the nature thereof; but it owes to every patient whom it admits the duty of saving him from an illegal operation [or] false, fraudulent, or fictitious medical treatment.' " *Albain*, at 259, 553 N.E.2d at 1046, quoting *Hendrickson v. Hodkin* (1937), 250 A.D. 619, 621, 294 N.Y.S. 982, 984-985 (Lazansky, P.J., dissenting), reversed (1937), 276 N.Y. 252, 11 N.E.2d 899.

The complaints against SEMC in the cases before us allege that the hospital breached these independent duties owed directly to Browning and Mitchell as patients at SEMC. The "negligent credentialing" causes of action include allegations that SEMC failed to exercise prudence in granting or continuing staff privileges, failed to conduct reasonable peer review, failed to protect appellees Mitchell and Browning from known incompetent medical care, and otherwise failed to save appellees Mitchell and Browning from medical treatment (surgery) of an unnecessary and experimental nature. These claims are not claims for *medical malpractice* and, thus, the medical malpractice line of cases and the "cognizable event" test do not apply. A hospital does not practice medicine and is

incapable of committing malpractice. See, generally, *Lombard v. Good Samaritan Med. Ctr.* (1982), 69 Ohio St.2d 471, 23 O.O.3d 410, 433 N.E.2d 162, and *Richardson v. Doe* (1964), 176 Ohio St. 370, 27 O.O.2d 345, 199 N.E.2d 878 (only physicians can commit "medical malpractice"). Further, appellees' claims against the hospital have nothing to do with any issue concerning derivative liability of the hospital for the acts of its agent or employee-physicians. The question whether Burt or Blue is employed by SEMC is neither clear on the record before us nor particularly relevant to our discussion. Mitchell's and Browning's negligent credentialing claims against SEMC are independent claims asserted directly against SEMC for the *hospital's* own acts or omissions in granting and/or continuing the staff privileges of the doctor(s). Thus, we must determine what type of claim is being asserted by Browning and Mitchell against SEMC and, in addition, what statute of limitations applies to such claims.

II

Medical Claim – R.C. 2305.11(B)(1) and (D)(3)

R.C. 2305.11(B)(1) provides, in part:

" * * * [A]n action upon a medical * * * claim shall be commenced within one year after the action accrued * * * ."

R.C. 2305.11(D)(3) provides, in part:

" 'Medical claim' *means any claim that is asserted in any civil action against a* physician, podiatrist, or *hospital*, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical

therapist, *and that arises out of the medical diagnosis, care, or treatment of any person.* * * * " (Emphasis added.)

A careful reading of R.C. 2305.11(B)(1) and (D)(3)[11] demonstrates that not all claims asserted against a hospital are "medical claims" subject to the period of limitations set forth in R.C. 2305.11(B)(1). Rather, a claim against a hospital is a "medical claim" within the meaning of R.C. 2305.11(D)(3), and is subject to the one-year limitation period set forth in R.C. 2305.11(B)(1), only if the claim arises out of the medical diagnosis, care, or treatment of a person. The terms "medical diagnosis" and "treatment" are terms of art having a specific and particular meaning relating to the identification and alleviation of a physical or mental illness, disease, or defect. See, generally, Black's Law Dictionary (6 Ed.1990), at 453-454 and 1502. Conversely, the word "care" is a general word without a specific legal meaning until placed in a particular context. Under the *ejusdem generis* rule of statutory construction, "care" as used in R.C. 2305.11(D)(3) (where the word is preceded by terms such as "physician," "hospital," "nurse," and "medical diagnosis") means the prevention or alleviation of a physical or mental defect or illness. Thus, the term "care" in R.C. 2305.11(D)(3) should not be broadly interpreted when the context in which it is used is properly understood.

With the foregoing discussion in mind, we believe that claims asserted against a hospital for negligent credentialing do not arise out of the medical diagnosis, care,

---

[11] The current version of R.C. 2305.11(B)(1) and (D)(3) has remained unchanged since the amendment to R.C. 2305.11 effective October 20, 1987. See 142 Ohio Laws, Part II, 3322-3325.

or treatment of a person. Negligent credentialing claims arise out of the *hospital's* failure to satisfy its independent duty to grant and continue staff privileges only to competent physicians. This independent duty does not directly involve diagnosis or the medical care and treatment of a patient. While the acts or omissions of a hospital in granting and/or continuing staff privileges to an incompetent physician *may* ultimately lead to an act of medical malpractice by the incompetent physician, the physician's ultimate act of medical malpractice is factually and legally severable and distinct from the hospital's acts or omissions in negligently credentialing him or her with staff membership or professional privileges.

Accordingly, we conclude that an action against a hospital for bodily injury arising out of the hospital's negligence in credentialing a physician is neither "malpractice" nor a "medical claim" to which the limitations period found in R.C. 2305.11 applies.[12]

---

[12] We reach this conclusion no matter which of the many previous versions of R.C. 2305.11 is considered. Prior to the October 1987 amendment to R.C. 2305.11 (142 Ohio Laws, Part II, 3322-3325), former versions of R.C. 2305.11(A) provided, in part, that "[a]n action for * * * malpractice, including an action for malpractice against a * * * hospital, * * * shall be brought within one year after the cause thereof accrued * * *." See 141 Ohio Laws, Part II, 3228; 139 Ohio Laws, Part I, 2153; 136 Ohio Laws, Part II, 3841; and 136 Ohio Laws, Part II, 2810. Again, a hospital does not practice medicine and cannot commit "malpractice." *Lombard* and *Richardson, supra.*

III

Discovery Rule – R.C. 2305.10

If a negligent credentialing cause of action is not a claim for malpractice or a medical claim, the obvious question becomes: What is it? It is, simply, a claim for bodily injury arising out of negligence which is not covered by the limitation periods found in R.C. 2305.11. Thus, we look to R.C. 2305.10, which provides in part:

"An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

A cause of action for negligent credentialing of a physician by a hospital which results in bodily injury is an action falling under the umbrella of R.C. 2305.10.

Pursuant to R.C. 2305.10, the two-year period of limitations begins to run when a cause of action for bodily injury "arose," while the R.C. 2305.11(B)(1) statute of limitations for "medical claims" begins to run when a cause of action "accrued." However, we believe that the terms "arose" and "accrued" are synonymous and that the rule of discovery long recognized in Ohio as applicable to the "accrual" of causes of action should be applied to the R.C. 2305.10 statute of limitations for claims of hospital *negligence* in credentialing a physician.

The history of the so-called discovery rule in Ohio is long and storied. The rule of discovery was originally recognized by this court in the medical malpractice context, but the rule has been generally accepted and applied in numerous areas of the law. See *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 223-227, 574 N.E.2d 457, 464-467

(Douglas, J., dissenting). Of particular significance, the discovery rule has been judicially applied to the general statute of limitations for bodily injury actions under former R.C. 2305.10. In *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727, paragraphs one and two of the syllabus, this court held that:

"1. Absent legislative definition, it is left to the judiciary to determine when a cause 'arose' for purposes of statutes of limitations.

"2. When an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant, for purposes of the statute of limitations contained in R.C. 2305.10."

O'Stricker was decided under a version of R.C. 2305.10 in effect prior to the 1980 amendment to the statute. The 1980 amendment to R.C. 2305.10 specifically adopted a discovery rule for bodily injury actions caused by exposure to asbestos and chromium. 138 Ohio Laws, Part II, 3412. In *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 609 N.E.2d 140, where a discovery rule provided by the General Assembly for DES-related injuries was found to be insufficient, we again had occasion to announce that a discovery rule applies to the R.C. 2305.10 general statute of limitations for bodily injury actions. Here, we extend the discovery rule to bodily injury actions resulting from a hospital's negligence in credentialing a physician.

IV

"Cognizable Event"

Although not directly applicable to the claims of hospital negligence in the cases before us, the rule of discovery for the accrual of causes of action for medical malpractice under R.C. 2305.11 was explained in *Allenius, supra,* as requiring the occurrence of a "cognizable event" "which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies." *Id.* at syllabus.

Today, we *borrow* from *Allenius* in constructing a rule of discovery applicable to R.C. 2305.10 for bodily injury actions arising from negligent credentialing by a hospital. We emphasize, however, that *Allenius* and our cases governing the accrual of causes of action for medical malpractice are not applicable to causes of action for hospital negligence in credentialing a physician. By its very nature, the discovery rule (concept) must be specially tailored to the particular context in which it is to be applied. Our decisions concerning the accrual of causes of action for medical malpractice are not applicable to determine the accrual date of claims not related to the medical malpractice of a physician.

The court of appeals found that the critical inquiry for determining the accrual date of the negligent credentialing causes of action requires pinpointing when the victims should have discovered that SEMC had failed to "provide adequate supervision or review of" Dr. Burt

(and Dr. Blue in the *Browning* case). The court of appeals found no evidence that Mitchell or Browning discovered or should have discovered that SEMC had failed to perform its legal duties until the women viewed the television program in October 1988 and realized that other former patients of Dr. Burt suffered from maladies similar to their own. Thus, the court of appeals held that summary judgment on the basis of the R.C. 2305.11(B)(1) statute of limitations was not proper in either case, since the complaints were filed within one year of the discovery of pertinent facts which placed appellees on notice to pursue a remedy against the hospital.

We agree with the court of appeals that in both cases the October 1988 television program was the event which triggered the running of the statute of limitations on Browning's and Mitchell's claims against SEMC – although it is the R.C. 2305.10 period of limitations which should have been applied. The court of appeals was absolutely correct in recognizing that the facts or events which might trigger the running of the statute of limitations for *medical malpractice claims against a doctor* do not necessarily commence the running of a statute of limitations on claims against a *hospital for hospital negligence* unrelated to the medical diagnosis, care, or treatment of a person. We, mildly and respectfully, disagree with the court of appeals to the extent that it found the "cognizable event" test of *Allenius* to be directly applicable in determining the accrual date of appellees' negligent credentialing claims. Mere mention of *Allenius* and the "cognizable event" test conjures up images of medical malpractice (to anyone who is familiar with our cases in this area), which may be one reason for the confusion in

the court of appeals, resulting in application of the wrong statute of limitations to appellees' causes of action for hospital negligence.

V

"Alerting Event"

In tailoring a rule of discovery applicable to R.C. 2305.10 for bodily injury actions arising from negligent credentialing by a hospital, we hold that a cause of action for negligent credentialing arises when the plaintiff knows or should know that he or she was injured as a result of the hospital's negligent credentialing procedures or practices. In our judgment, the only evidence of any perspicuous event which should have alerted appellees Browning and Mitchell to pursue their negligence claims against SEMC occurred in October 1988. Upon viewing a television program, Browning and Mitchell became aware that many of Burt's ex-patients suffered from abnormalities similar to their own as a consequence of Burt's surgical practices at SEMC. The record is devoid of evidence that appellees knew or should have known prior to October 1988 that SEMC may have done something wrong in granting or continuing privileges to Dr. Burt or Blue. The "special Burt consent" form in Browning's and Mitchell's hospital records would not have apprised Mitchell and Browning that their doctor(s) may have committed a number of harmful, improper or unwarranted surgeries upon a number of unsuspecting patients such that SEMC's credentialing practices could reasonably be brought into question. Accordingly, the R.C. 2305.10 statute of limitations was triggered in October 1988, and the

complaints against SEMC were filed well within the applicable two-year period of limitations.[13]

Obviously, we do not hold that a television program like the one at issue in these cases is necessary to trigger the running of the R.C. 2305.10 statute of limitations in every case of negligent credentialing. It is sufficient if a plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices. Such an occurrence might be termed an "alerting event," if for no other reason than to contrast the occurrence triggering the commencement of the statute of limitations for negligence in R.C. 2305.10 from the "cognizable event" of R.C. 2305.11 limitation periods. However, discovery of a physician's medical malpractice does not, in itself, constitute an "alerting event" nor does such discovery implicate the hospital's credentialing practices or require investigation of the hospital in this regard. To hold otherwise would encourage baseless claims of negligent credentialing and a hospital would be named in nearly every lawsuit involving the malpractice of a physician.

VI

R.C. 2305.25

SEMC and *amicus curiae*, Ohio Hospital Association, suggest that hospitals are immune from liability for the

---

[13] It is interesting to note that even if Browning's negligent credentialing claims against SEMC accrued in August 1987 as the trial court suggested, the action would still have been timely filed against SEMC under the applicable two-year period of limitations.

acts, omissions and decisions of their peer review committees by virtue of R.C. 2305.25 and that, therefore, a hospital cannot be liable for negligent peer review. We reject this argument.

R.C. 2305.25 provides, in part:

"*No hospital,* no state or local society, and no individual *who is a member* or employee *of any of the following committees shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the committee:*

" * * *

"(E) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine and surgery, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or registered pharmacists[.]" (emphasis added.)

Following a listing of the specific review boards and committees, R.C. 2305.25 provides that:

"Nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient.

"This section shall also apply to any member or employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators or of a peer review or professional standards review committee. No person who provides information under this section and provides such information without malice and in the reasonable

belief that such information is warranted by the facts known to him shall be subject to suit for civil damages as a result thereof."

The purposes of R.C. 2305.25 are clear. The statute extends limited protection to those who provide information to certain review boards and committees to encourage the free flow of information without threat of reprisal in the form of civil liability. See, generally, *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 113, 573 N.E.2d 609, 612. The statute also seeks to protect those serving on committees and committee employees for the obvious reason that it could be difficult to staff a committee absent such protections. However, the cases at bar do not involve a situation where SEMC has been either the provider of information to a committee (see, *e.g.*, R.C. 1742.141), or the participant on a committee. It is clear to us that R.C. 2305.25 does not provide blanket immunity to a hospital for negligence in granting and/or continuing staff privileges of an incompetent physician.

SEMC protests that R.C. 2305.25 and 2305.251 prevent a hospital from defending itself against claims for negligent peer review. According to SEMC, these statutes require that no evidence as to any matter brought to the attention of peer review committees, or actions taken by those committees, can be introduced into evidence in the hospital's defense. We reject SEMC's contentions for a number of reasons, but quoting from the following portion of R.C. 2305.251 should dispel any notion that SEMC's arguments are meritorious:

" * * * Information, documents, or records otherwise available from original sources are not to be construed as

being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of a committee nor should any person testifying before a committee or who is a member of the committee be prevented from testifying as to matters within his knowledge, but the witness cannot be asked about his testimony before the committee or opinion formed by him as a result of the committee hearing."

VII

Summary of Holdings re Claims Against SEMC

In summarizing our discussion concerning the claims against SEMC, we hold that:

1. Hospital negligence arising out of the "care" of a patient is a "medical claim" within the meaning of R.C. 2305.11(D)(3) and is subject to the period of limitations set forth in R.C. 2305.11(B)(1). "Care" as used in R.C. 2305.11(D)(3) is the prevention or alleviation of a physical or mental defect or illness.

2. Negligent credentialing of a physician by a hospital is not "medical diagnosis, care, or treatment" within the meaning of R.C. 2305.11.

3. An action against a hospital for bodily injury arising out of the negligent credentialing of a physician is subject to the two-year limitations period set forth in R.C. 2305.10.

4. The period of limitations set forth in R.C. 2305.10 commences to run when the victim knows or should have discovered that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.

5. R.C. 2305.25 does not provide a hospital with immunity from liability for the hospital's negligence in granting and/or continuing the staff privileges of an incompetent physician.

For the reasons stated herein, which differ, in part, from the reasoning of the court of appeals, we affirm the court of appeals' judgment in case No. 91-2121 (Mitchell) and that portion of the court of appeals' judgment in case No. 91-2079 (Browning) which reversed the judgment of the trial court with respect to the dismissal of the action against SEMC.[14]

VIII

Consortium Claim of Lawrence Browning Against Blue

The only remaining question before us concerns the appeal of Dr. Blue in case No. 91-2079 (Browning) regarding the reinstatement of Lawrence Browning's consortium claim against Blue. For the reasons that follow, we affirm the judgment of the court of appeals.

Blue contends that Lawrence Browning did not appeal to the court of appeals and, thus, the appellate court had no jurisdiction to reverse the judgment of the trial court on any issue relating to Lawrence's claim against Blue. However, the record does not support this contention and, therefore, we reject Blue's argument.

---

[14] Lawrence Browning's consortium action against SEMC, premised upon SEMC's alleged negligence in credentialing Drs. Burt and Blue, was timely filed and we reject SEMC's arguments to the contrary.

Blue also suggests that the court of appeals abused its discretion in finding that the R.C. 2305.09 statute of limitations applied to Lawrence's consortium claim against Blue, since no party briefed or argued the issue or raised the question in an assignment of error to the court of appeals. We find no abuse of discretion. The law is clear that spousal consortium claims arising from medical malpractice are governed by the R.C. 2305.09(D) four-year period of limitations, when the principal claim for malpractice accrued, as it did here, prior to the effective date of the October 1987 amendment to R.C. 2305.11. *Hershberger, supra*, 34 Ohio St.3d at 6, 516 N.E.2d at 208.[15] Furthermore, the issue decided by the court of appeals did not involve the constitutionality of a statute and, thus, the case of *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 522 N.E.2d 524, is distinguishable. A number of other cases cited by Blue merely recite the general rule of law that issues may be treated as waived if not raised at the first opportunity or assigned as error in the court of appeals. However, there is no general prohibition in App.R. 12(A) requiring that issues be treated as waived.

Finally, Blue suggests that even under the R.C. 2305.09 statute of limitations, Lawrence Browning's action against Blue for loss of consortium was untimely filed. Specifically, Blue urges that Mrs. Browning's malpractice claim against Blue "accrued" within the meaning

---

[15] In this regard, we note that the October 1987 amendment to R.C. 2305.11 specifically made certain derivative claims subject to the same period of limitations as the principal claim. See R.C. 2305.11(D)(3); 142 Ohio Laws, Part II, at 3324.

of R.C. 2305.11 as early as 1983 and, thus, Lawrence Browning had four years from that time to commence suit against Blue, but failed to do so. However, Mrs. Browning's malpractice claim against Blue was found by the trial court and court of appeals to have accrued in August 1987 at the latest. Since the R.C. 2305.09(D) four-year period of limitations on Lawrence's claim against Blue commenced to run on the same date that the R.C. 2305.11 one-year period of limitations began to run on Browning's malpractice claim against Blue, *Hershberger, supra,* paragraph two of the syllabus, Lawrence's claim was timely filed. This is especially true given the fact that Browning continued her treatment with Blue until August 1987. See *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus.

IX
Conclusion

In reaching our conclusions, we do not pass judgment (since issues of alleged liability are yet to be determined) on Dr. Blue or SEMC, although it is tempting to do so given what the record shows has happened to these two women. Perhaps now they, and others, will have their day in court, where the conspiracy of silence in the local medical community which permitted the atrocities to be committed, and the atrocities themselves, can be more fully explored. Further, nothing in our opinion should be read to stand in the way of the proper performance of progressive medicine.

For all the reasons set forth herein, we affirm the difficult and courageous judgments of the court of appeals.

Judgments affirmed.

A.W. SWEENEY, F.E. SWEENEY AND PFEIFER, JJ., concur.

MOYER, C.J., WRIGHT and COOK, JJ., concur in part and dissent in part.

DEBORAH L. COOK, J., of the Ninth Appellate District, sitting for RESNICK, J.

MOYER, C.J., concurring in part and dissenting in part. I concur with the majority's disposition of Lawrence Browning's consortium claim against Dr. Blue. However, I respectfully dissent from the majority opinion because (1) a "negligent credentialing" cause of action is a "medical claim" and is subject to the one-year limitations period set forth in former R.C. 2305.11, and (2) plaintiffs' claims against St. Elizabeth Medical Center ("SEMC") had already accrued and were time-barred by the time plaintiffs viewed the "West 57th" television program.

I

Because the majority's newly styled "negligent credentialing" cause of action is created from the language of a previous decision of this court, it is important to first consult that language before analyzing the cases *sub judice*. In *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 553 N.E.2d 1038, we recognized, as an exception to the independent contractor rule, the right of a plaintiff to hold an employer directly liable for injuries proximately caused by the employer's own negligence in selecting or

retaining an independent contractor. We applied this rule to the hospital setting and held that a hospital can be held liable for the medical malpractice of a staff physician where the injured party can prove that the hospital was negligent in granting or in continuing the staff privileges of the independent physician. Paragraph two of the syllabus of that decision reads:

"In regard to staff privileges, a hospital has a direct duty to grant and to continue such privileges only to competent physicians. A hospital is not an insurer of the skills of private physicians to whom staff privileges have been granted. In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that *but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured.*" (Emphasis added.)

The above-emphasized language underscores a crucial point underemphasized by the majority's opinion: under *Albain,* claims against a hospital for negligent retention or selection of a staff physician are dependent on an underlying medical malpractice claim against the staff physician. In order to prevail in a cause of action for negligent credentialing against a hospital pursuant to *Albain,* the plaintiff must establish not only negligent selection and/or retention of a physician, but also that but for the hospital's negligence, the plaintiff would not have been injured. That is, *Albain* requires that the underlying malpractice of the physician be proven before the plaintiff can recover damages against the hospital for its own negligence. Without an underlying harm to the hospital's patient through medical malpractice, an action

against the hospital for negligent credentialing will never arise. Although medical malpractice claims against the doctor and negligent credentialing claims against the hospital are separate causes of action, with separate and distinct duties owed to a singular class of individuals, both causes of action fail without proof that the physician's failure to abide by ordinary standards of care proximately caused the patient's harm.

Having failed to fully appreciate the significance of the interdependence between the negligent credentialing claims and the underlying malpractice claims, the majority has also erroneously held that a negligent credentialing cause of action is subject to the two-year limitations period set forth in R.C. 2305.10, rather than the one-year period found in former R.C. 2305.11.[16]

---

[16] Current R.C. 2305.11(B)(1), unlike the former version of the statute, specifically states that an action on a "medical * * * claim" (like those actions based upon a dental, optometric, or chiropractic claim) is required to be commenced within one year after the action accrued. Under R.C. 2305.11(D)(3), "medical claim" includes claims which seek to hold a hospital responsible for its *own* torts as well as those alleging the hospital is vicariously liable for the wrongful acts of its employees and agents. In both cases, the claim must be one that "*arises out of* the medical diagnosis, care, or treatment of any person" before the one-year limitations period is applicable. (Emphasis added.) R.C. 2305.11(D)(3) reads:

" 'Medical claim' means any claim that is asserted in any civil action against a physician, podiatrist, or *hospital*, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, *and that arises out of the medical diagnosis, care, or treatment of any person*. 'Medical claim' includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person." (Emphasis added.)

Under the version of R.C. 2305.11 in effect at the time the plaintiffs' causes of action arose, "medical claim" was defined in R.C. 2305.11(D)(3) as "any claim asserted in any civil action against a physician, podiatrist, or hospital *arising out of* the diagnosis, care, or treatment of any person." (Emphasis added.) 139 Ohio Laws, Part I, 2154. Although former R.C. 2305.11 did not explicitly state that a "medical claim" is subject to the one-year limitations period contained in former R.C. 2305.11(A), I believe that the one-year statute of limitations is nonetheless applicable. As Justice Holmes correctly explained in his dissent in *Lombard v. Good Samaritan Med. Ctr.* (1982), 69 Ohio St.2d 471, 475-476, 23 O.O.3d 410, 413, 433 N.E.2d 162, 165, the General Assembly intended the words "malpractice" and "medical claim" to be used interchangeably:

" * * * The second paragraph of R.C. 2305.11(A) allows one to serve written notice, prior to expiration of the time in R.C. 2305.11(A), upon a person and extend the time in which a suit may be brought against that person by up to 180 days from the time notice is given. This paragraph does not refer at all to malpractice. Rather, it uses the phrase 'medical claim." This is evidence that the General Assembly considered the words 'malpractice' and 'medical claim' to be synonymous, for if the legislative intent was to give these words different meanings, it would make little sense to include actions such as the present one in a subsection that did not apply to them."

I would, therefore, hold that a negligent credentialing cause of action against a hospital, like a medical malpractice lawsuit brought against a physician, is subject to the one-year statute of limitations of R.C. 2305.11. Claims asserted against a hospital for negligent credentialing do

arise out of a patient's medical diagnosis, care, or treatment. In every instance, the plaintiff-patient is alleging that the staff physician has rendered him or her substandard diagnosis, care, or treatment which proximately resulted in plaintiff's alleged injuries. The negligent credentialing claim against the hospital would not have arisen but for the underlying medical malpractice. Accordingly, the instant actions against the hospital are "medical claim[s]" within the meaning of former R.C. 2305.11(D)(3) and the plaintiffs had one year from the time of accrual in which to file their lawsuits.

II

What remains to be determined is the proper accrual date of the plaintiffs' negligent credentialing causes of action against SEMC. Our prior decisions establish that a cause of action for medical malpractice accrues when the patient discovers or, in the exercise of reasonable care, should have discovered the resulting injury, or when the physician-patient relationship for that condition terminates, whichever occurs later. *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, syllabus. The term "cognizable event" was used in *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93, to identify the point in time when the patient in fact discovers or reasonably should have discovered the resulting injury. *Allenius* cited the following language of *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 5 OBR 247, 449 N.E.2d 438, paragraph one of the syllabus: " 'Under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run

when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury.' " *Allenius, supra,* 42 Ohio St.3d at 133, 538 N.E.2d at 95.

Therefore, a "cognizable event" is an occurrence "which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies." *Allenius, supra,* at syllabus. Concurring in that opinion in order to emphasize that it is discovery of the physical injury – not discovery of the legal claim – which triggers the statute of limitations, I stated:

"[I]n determining when the statute of limitations is triggered, ' "[t]he test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." ' * * * As indicated by the majority, it is cognizable event such as the occurrence of pain or injury ' * * * rather than knowledge of its legal significance that starts the running of the statute of limitations.' " *Allenius, supra,* at 135, 538 N.E:2d at 97.

That proposition was recognized in a later decision by this court in *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284, 1287-1288:

"Moreover, *constructive* knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under

the discovery rule. * * * A plaintiff need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations. * * * Rather, the 'cognizable event' itself puts the plaintiff on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies. * * * " (Emphasis *sic.*)

The facts or circumstances which give rise to a "cognizable event" for purposes of discovery of a medical malpractice claim do not automatically give rise to a claim against a hospital for negligent credentialing. "A physician's negligence does not automatically mean that the hospital is liable, and does not raise a presumption that the hospital was negligent in granting the physician staff privileges." *Albain, supra,* 50 Ohio St.3d at 258-259, 553 N.E.2d at 1046. As noted by the majority, the statute of limitations for negligent credentialing begins to run when the "plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices." Here, the majority has followed the lead of the court of appeals in determining that there was no evidence before the trial court that the plaintiffs knew or should have known that the hospital had failed to perform its legal duty toward them until plaintiffs viewed the "West 57th" television show. I strongly disagree because I believe the plaintiffs had earlier notice of SEMC's negligence in granting staff privileges to the defendant-physicians.

The record indicates that both Browning and Mitchell signed the following acknowledgement on SEMC letterhead prior to having Dr. Burt perform vaginal reconstruction surgery:

"Dear Patient:

"The Executive Committee of the Medical Staff of St. Elizabeth Medical Center wishes to inform you that the 'female coital area reconstruction' surgery you are about to undergo is:

"1. Not documented by ordinary standards of scientific reporting and publication.

"2. Not a generally accepted procedure.

"3. As yet not duplicated by other investigators.

"4. Detailed only in non-scientific literature.

"You should be informed that the Executive Committee of the Medical Staff considers the aforementioned procedure an unproven, non-standard practice of gynecology."

The majority completely overlooks the impact of the signed consent form in determining when the plaintiffs' negligent credentialing causes of action against SEMC accrued. Instead, the majority holds that plaintiffs' causes of action accrued no earlier than the date Browning and Mitchell viewed the "West 57th" television program. In this regard, the majority asserts that notice of a hospital's negligent credentialing practices only occurs where the patient has been apprised that his or her doctor "may have committed a number of harmful, improper or unwarranted surgeries upon a number of unsuspecting

patients such that [a hospital's] credentialing practices could reasonably be brought into question." I disagree and would hold, contrary to the majority opinion, that the plaintiffs' causes of action against SEMC could accrue even without notice that other former patients were suffering from similar conditions.

One is not left to imagine the purpose SEMC had in supplying this form letter to patients about to undergo Dr. Burt's unusual surgery. SEMC was clearly attempting to insulate itself from liability. In doing so, the hospital was telling its patients that Dr. Burt's specific brand of reconstruction surgery was unlike any other known form of reconstruction surgery. The experimental nature of this surgery therefore carried with it additional risks not associated with standard and generally accepted surgical procedures. Because it is not before this court, we leave unresolved the issue whether the hospital can effectively assert this letter as a defense to the Browning and Mitchell lawsuits. However, the letter's relevance in placing these former patients on notice that SEMC itself may have breached a duty owed to them by allowing such surgeries to be performed on its premises should not likewise go unresolved.

If the majority properly applied *Allenius* and *Flowers* to these facts, the conclusion would be that the form letter was effective to place both Browning and Mitchell on notice that SEMC may have failed to properly perform its credentialing duties by permitting a physician's questionable surgical procedures. The next question to be answered is when the statute of limitations began to run on the patients' negligent credentialing causes of action against SEMC. Obviously, the statute did not begin to run

when Browning and Mitchell were supplied with the form letter because the surgeries had yet to be performed and they, therefore, could claim no resulting injury. Since they had no reason to believe they were harmed, it is equally unfair to hold that the statute of limitations was triggered when the operations were first performed. In medical malpractice cases, the running of the statute of limitations is delayed from the traditional date of injury to the date a "cognizable event" is discovered, in order to eliminate unfairness to medical malpractice plaintiffs. See *Flowers, supra,* 63 Ohio St.3d at 550, 589 N.E.2d at 1288. Accordingly, it was not until Browning and Mitchell became aware that the injuries they complained of were related to the doctors' surgeries that they should have appreciated the significance of the hospital's form letter. *Allenius* clearly envisions and requires that the patient investigate and pursue all "possible remedies" once he or she has been put on notice by the cognizable event. See *Allenius,* 42 Ohio St.3d 131, 538 N.E.2d 93, syllabus.

Among the "possible remedies" of a plaintiff harmed by the malpractice of a physician are claims against a hospital for negligent credentialing procedures when that patient has information of circumstances sufficient to put a reasonable person on inquiry that the hospital may have breached a duty owed to him or her. At the time their causes of action against the doctors accrued, the form letter provided notice to plaintiffs of a possible claim against SEMC or at least should have alerted them to the need to investigate such claim.

In case No. 91-2079, Browning informed Dr. Blue at the latest in August 1987 that he had committed malpractice on her. By that time, Browning had undergone

approximately sixteen surgeries and her physical and emotional health was continuing to decline. The trial court, therefore, correctly found that August 1987, at the very latest, was the time when Browning was put on notice by a "cognizable event" to pursue her medical malpractice claim and the one-year statute of limitations of R.C. 2305.11 began to run. To hold otherwise is to cast aside the "cognizable event" test this court announced just four years ago in an effort to give trial courts some useful standard in medical malpractice cases. Because Browning should also have been aware of SEMC's negligence in permitting her doctor's experimental surgery, her cause of action against the hospital for negligent credentialing and retention also accrued on this date. Both causes of action were barred because Browning filed her complaint on April 17, 1989, outside the one-year period of limitations.

In case No. 91-2121, Mitchell underwent Dr. Burt's reconstruction surgery in January 1985. The medical problems to be alleviated by this surgery (which included urinary incontinence, bladder and vaginal infections and painful sexual intercourse) actually worsened within a few months after the January 1985 surgical procedure. The record indicates that by mid-1985, intense pain and massive vaginal bleeding made it impossible for Mitchell to engage in sexual intercourse with her husband. Mitchell was also aware of the unusual appearance of her vagina at this time. She discovered that her vagina "was covered over" and "sewn up." Certainly, these occurrences gave rise to a "cognizable event" for purposes of Mitchell's discovery of her medical malpractice claim. Like Browning, the SEMC form letter could reasonably be

expected to place Mitchell on notice of the need to pursue her "possible remedy" against the hospital. Since Mitchell's complaint against the hospital was filed more than three years after she was placed on notice, the trial court correctly found it was time-barred.

For the foregoing reasons, I would reverse the judgment of the court of appeals as it relates to the claims of plaintiffs against SEMC and reinstate the grants of summary judgment by the trial court.

COOK, J., concurs in the foregoing opinion.

WRIGHT, J., concurring in part and dissenting in part. Along with the Chief Justice, I agree with the majority's disposition of Lawrence Browning's consortium claim, but disagree with the majority's disposition of the plaintiffs' negligent credentialing claims against St. Elizabeth Medical Center. Unlike the Chief Justice though, because I believe a *negligent* credentialing claim is necessarily grounded in negligence, I agree with the majority's holding in paragraph three of the syllabus that "[a]n action against a hospital for bodily injury arising out of the negligent credentialing of a physician is subject to the two-year limitations period set forth in R.C. 2305.10."

However, I find it completely unnecessary to create a new event, the "alerting event," as the accrual date for the running of the statute of limitations. The "cognizable event" which we recognized in *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93, the event by which " 'the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury,' " is the event which "place[s] the patient on notice of the need to pursue his possible remedies." *Id.* at

133, 538 N.E.2d at 95, and at syllabus (quoting, in part, *Oliver v. Kaiser Community Health Found.* [1983], 5 Ohio St.3d 111, 5 OBR 247, 449 N.E.2d 438, paragraph one of the syllabus). One of the "possible remedies" of which the plaintiff is on notice is a negligent credentialing claim.

I certainly agree with the majority that not every case of malpractice will give rise to a negligent credentialing claim. However, as the Chief Justice points out, every negligent credentialing claim will by necessity arise out of a malpractice claim because the plaintiff must have been injured by the hospital's actions in negligently credentialing the physician in question. Therefore, it seems to me that the cognizable event which is the accrual date for a malpractice action is the same point in time at which, as the majority writes, the "plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant *investigation* of the hospital's credentialing practices." (Emphasis added.)

I disagree with the majority that use of this cognizable event to trigger the statute of limitations for a negligent credentialing claim will "encourage baseless claims of negligent credentialing and a hospital would be named in nearly every lawsuit involving the malpractice of a physician." The majority overlooks the fact that the malpractice action has a one-year limitations period while the negligent credentialing claim will have a two-year limitations period. This allows plaintiffs additional time to investigate whether the injury caused by the malpractice was a result of the hospital's negligent credentialing of the physician.

My view of the record is that the "cognizable event" as to both appellees with respect to the hospital took place at a far earlier time than the television show described by the majority. Accordingly, I would remand the matter to the trial court to determine the precise time frames involved.

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

JIMMIE DEAN BROWNING, ET AL.	:	
Plaintiffs-Appellants	:	CASE NO. 12176
	:	(C.P. #89-1341)
vs.	:	
JAMES BURT, M.D., ET AL.	:	
Defendants-Appellees	:	

OPINION

Rendered on the 20th day of August, 1991

MARYLEE GILL SAMBOL, 109 North Broadway Avenue, Olde Towne Professional Building, Trotwood, Ohio 45426
Attorney for Plaintiffs-Appellants

FRANK C. WOODSIDE, III, JOHN E. SCHLOSSER, K.C. GREEN AND CLARA SUE MILLER, 500 Courthouse Plaza, S.W., 10 North Ludlow Street, Dayton, Ohio 45402
Attorneys for Appellee, St. Elizabeth Medical Center

NEIL F. FREUND and ROBERT N. SNYDER, 1800 Dayton Arcade Center, One South Main Street, Dayton, Ohio 45402
Attorneys for Appellee, Max E. Blue, Jr., M.D.

EARL H. MOORE, JR., 120 West Second Street, 333 Hulman Building, Dayton, Ohio 45402
Attorney for Defendant, James C. Burt, M.D.

BROGAN, J.

Appellant, Jimmie Dean Browning, appeals from the order of the Montgomery County Common Pleas Court which granted summary judgment in favor of the defendants Max Blue, M.D. and the St. Elizabeth Medical Center upon appellant's complaint which alleged, inter alia, medical malpractice. We Affirm with respect to Dr. Blue and Reverse with respect to St. Elizabeth Medical Center.

On April 17, 1989, Ms. Browning filed a complaint in which she asserted that Max Blue had negligently, willfully, and wantonly referred her to James Burt, M.D., so he could perform experimental vaginal reconstruction surgery upon her. She asserted that Blue had advised her that the surgery was a necessary medical treatment for her bladder problems. She further asserted that Blue assisted Burt in the surgical procedure and that she did not consent to the surgery which was performed upon her.

In Count Two of the complaint, Ms. Browning asserted that on January 29, 1981 Blue began a negligent, willful, and wanton course of performing sixteen medically unnecessary surgeries upon her culminating in the removal of her right kidney. She asserted that such surgeries damaged her genital-urinary system.

In Count Three she asserted that Dr. Burt at the request of Dr. Blue performed the experimental surgery on February 19, 1982, changing her genital organs to an unnatural and bizarre configuration causing her permanent physical and emotional injury.

In Count Four, she contended that St. Elizabeth Medical Center negligently, intentionally, and wilfully permitted Drs. Blue and Burt to perform the unnecessary and experimental surgeries by failing to provide adequate peer review and by failing to protect the plaintiff from known incompetent medical care.

In Count Five, Laurence Browning sought damages for loss of society and consortium caused by the alleged conduct of the defendants. He has also appealed.

Both defendants answered generally denying the allegations of the complaint and both raised the defense that the plaintiffs' claims were barred by the statute of limitations. Both defendants then moved for summary judgment on the limitations defense which was granted by the trial court. The plaintiff obtained a default judgment against Dr. Burt but damages remained to be determined. The court thus entered a Civ. R. 54(B) finding in order to render its orders appealable.

In the appellants' first and third assignments of error, they contend the trial court erred in granting the summary judgments to the defendants because the evidence presented a genuine material factual issue as to when Jimmie Browning should have reasonably discovered or did discover that she had been the victim of malpractice by the respective defendants. In their second assignment, they contend the court erred in considering hearsay evidence in determining the limitations issue.

Both Dr. Blue and St. Elizabeth Medical Center relied upon the deposition of the plaintiff as the evidentiary material which they both contend demonstrates that there

are no material facts in dispute and they were both properly granted summary judgment as a matter of law on their defense of the statute of limitations.

The time frame for filing medical malpractice suits is governed by R.C. 2305.11(B)(1) which provides for a one-year limitation, judicially construed to run "when the patient discovers, or in the exercise of reasonable care and diligence should have discovered the resulting injury." *Oliver v. Kaiser Community Health Foundation* (1983), 5 Ohio St. 3d 111.

A cause of action for medical malpractice accrues when the patient discovers or should have discovered the resulting injury or when the physician-patient relationship for that condition terminates, whichever occurs later. *Frysinger v. Leech* (1987), 32 Ohio St. 3d 38.

In medical malpractice actions, for purposes of determining the accrual date in applying the statute of limitations, the trial court must look to the facts of the particular case and determine (1) when the injured party became aware, or should have become aware of the extent and seriousness of his condition and that such condition was related to a specific professional medical service previously rendered him, and whether such condition would put a reasonable person on notice of the need for further inquiry as to the cause of such condition. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1. The "extent and seriousness of his condition" language set forth in *Hershberger* requires that there be an occurrence of a cognizable event" which does or should lead the patient to believe the condition of which the patient complains is related to a medical procedure, treatment or

diagnosis rendered the patient and where that event does or should place the patient on notice of the need to pursue his remedies. *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131. A cognizable event was defined as "some noteworthy event" which does or should alert a reasonable patient that an improper procedure, treatment, or diagnosis has taken place. *Id.* at 134.

The cognizable event analysis allows a patient to "reasonably" rely on his physician's assurances while placing a continuing duty on the medical profession to act with the requisite skill and care. *Herr v. Robinson Memorial Hospital* (1990), 49 Ohio St. 3d 6.

The evidence established that the plaintiff experienced bladder and urethra problems for which she was operated upon at Wright Patterson Air Force Base Hospital in 1976 and 1977.

The plaintiff began treatment with Dr. Blue a urologist, for bladder and urinary problems in August of 1980. In February 1982 Blue referred the plaintiff to Dr. Burt for an exploratory pelvic laparotomy with lysis and vaginoplasty. In layman's terms, Burt explained to the plaintiff that he was going to place the plaintiff's bladder upon a pedestal so that the plaintiff would no longer experience pain during intercourse with her husband. Plaintiff also said Burt indicated he would perform a few cosmetic things to enhance her sex life. (Dep. 49). She said Burt explained that every time she had sex with her husband his penis struck her bladder.

The plaintiff admitted that she signed a consent form at St. Elizabeth's authorizing Dr. Burt to perform a procedure called vaginal reconstruction upon her. (Def. Ex. C to Dep.)

Dr. Burt put a super pubic catheter in her during the surgery and the plaintiff wore it for some six months. The plaintiff said when Dr. Burt took it out she could not void and became obstructed. (Dep. 53). Ms. Browning said she experienced a great deal of pain from being obstructed and she was in such pain she couldn't turn over in bed. She said she developed kidney and bladder infections for which Dr. Blue provided treatment. She said Dr. Blue told her that her "urethral tube wouldn't stay open." (Dep. 55). She said her bladder infections were worse after the "love surgery" and her sex life actually deteriorated. The plaintiff also started having problems with holding her urine after the catheter was removed. (Dep. 55).

Ms. Browning stated she told Dr. Burt about the problems she was experiencing with her sex life after the 1982 surgery and he told her "she shouldn't be having any." (Dep. 90). She said he told her he was leaving town and if she had any problems she was to contact a doctor whose name he supplied. (Dep. 92). In August 1986, Dr. Blue removed plaintiff's right kidney. This surgery did not improve plaintiff's condition. She stated that her problems were worse and she developed right flank pain and an "awful lot of swelling" in her back after her 1986 surgery. (Dep. 14). Plaintiff was unable to work after the 1986 surgery and applied for and ultimately received total disability with the Social Security Administration.

When the plaintiff's problems persisted, she made arrangements through her daughter to see a Dr. Montague, a urologist, at the Cleveland Clinic in June 1987. (Dep. 18). The plaintiff told Dr. Montague "I thought that something was wrong, you know, from the surgery I'd had, that I didn't get over it and when he took my kidney out, I thought I wouldn't have any more problems." (Dep. 19,20).

Plaintiff said Dr. Montague conducted a pelvic examination of her and sent a report of his examination to Dr. Blue and her. She said Dr. Montague stated in the report that she had a benign prostate[1] gland and based on the report she was denied Social Security benefits. Dr. Montague also indicated in the report that there was a "flaw" in appellant's previous surgery. The plaintiff said that Dr. Blue was told by Dr. Montague in a phone conversation about the flaw. The plaintiff never pursued the "flaw" statement in further detail.

The plaintiff stated Dr. Montague told her she "was voiding pretty good and that he thought I should go for some counseling because I wasn't willing to accept my condition or change my lifestyle or something." (Dep. 19). After plaintiff's visit to Dr. Montague sometime between June and August 1987 the plaintiff told Dr. Blue that she thought "he had done a malpractice operation" on her because she was not getting well. (Dep. 16). The plaintiff said that Dr. Blue denied he had committed any malpractice upon her. She said she asked him why she

---

[1] a term sometimes applied to the periurethral glands in the upper part of the urethra in the female. Stedman's Medical Dictionary, Fifth Unabridged Edition (1982).

had been through all the surgeries and been in the hospital so many times if there wasn't anything wrong with her and "every time he told me I was going to be just fine that time." (Dep. 40). She said she told Dr. Blue that Dr. Burt had told her that half of the surgeries that she had performed on her were malpractice. She said Blue said: "I wouldn't go so far as to say you had a malpractice operation. You've had a lot of trouble, but I wouldn't necessarily say it was malpractice." (Dep. 42).

The plaintiff said Dr. Burt made his remark to her right before she quit seeing him in 1983. She said she assumed Dr. Burt was referring to Dr. Blue. (Dep. 44). Prior to her hospitalization under the care of Dr. Patwa the plaintiff was informed by attorney Ingolf Dinklage that "I'd probably had a malpractice surgery." (Dep. 97).

Subsequently, in August 1987, the plaintiff was hospitalized under the care of a psychiatrist, a Dr. Patwa. While plaintiff was hospitalized she again encountered Dr. Blue. She said Dr. Blue "wanted me to forget everything that letter said from the Cleveland Clinic and I told him he was a liar." (Dep. 35). She testified she told her psychiatrist, Dr. Patwa, in 1987 that she hated Dr. Blue because she felt like he had ruined her life because after her kidney was removed she still wasn't well. (Dep. 63). She said she thought ever since 1987 that Blue had committed malpractice upon her. (Dep. 35). The evidence indicates the plaintiff never returned to see Dr. Blue after August 1987.

Ms. Browning filed the following affidavit in opposition to the motions for summary judgment:

After Dr. Max Blue performed sixteen (16) surgeries on me, I was very upset and angry with him, because he kept telling me that each additional surgery would make me well and I did not get any better after the surgeries.

I was also angry with Dr. Blue, because I became aware that he destroyed some of my records which were in his office.

I saw the television program West 57th Street on October 30, 1988. I had the same symptoms as Dr. Burt's patients, which were on that show, complained of.

I had surgery performed by Dr. Burt and Dr. Blue, and I wanted to know whether they had performed experimental surgery on me.

I went to see attorney Ingolf Dinklage, 333 West First Street, about a claim, against Dr. Blue and Dr. Burt. Attorney Dinklage told me by letter on December 21, 1988 that I had no malpractice claim. Exhibit #1 attached hereto is a true and exact copy of the letter which I received from attorney Dinklage.

After I received attorney Dinklage's letter, I consulted my present attorney who referred me to Dr. Richard Salzer for examination, and had my medical records reviewed by Dr. Salzer M.D. and Dr. Stanesic in Arizona, and filed suit on my behalf.

In granting the summary judgment for the appellees the trial court made these observations:

> From these bits of testimony and numerous others spread throughout [Browning's] deposition the Court concludes that Mrs. Browning knew at the latest in August, 1987, that she had

> problems that required further inquiry when she told Dr. Blue he had committed malpractice on her. After she had a pelvic examination in June, 1987, Dr. Montague put in a letter that there was a "flaw" in her surgery, that she knew about. The continuing worsening of symptoms culminated by being informed there was a "flaw" in her surgery is a "cognizable event" which did lead Mrs. Browning telling Dr. Blue that he had "committed malpractice" on her and should have placed her on notice to pursue her remedies, but she did not do [sic] until April 17, 1989.

The evidence is uncontroverted that no later than August 1987 the plaintiff believed that Dr. Blue had committed malpractice in his medical treatment of her. She admitted that her medical problems were not alleviated by her 1982 surgery. She admitted Dr. Burt told her in 1983 that half of her surgeries were unnecessary and she assumed Burt was talking about Blue. (Dep. 43). She admitted that she believed that Dr. Blue had committed malpractice after her consultation with Dr. Montague at the Cleveland Clinic and that Montague had indicated the presence of a "flaw" in plaintiff's previous surgery. Finally sometime in the summer of 1987 an attorney told the plaintiff he believed the plaintiff had been the victim of malpractice.

If a patient believes, because of harm she has suffered, that her treating medical professional has done something wrong, such a fact is sufficient to alert a plaintiff to the necessity for investigation and pursuit of her remedies. *Allenius v. Thomas, supra* at 134. The trial court properly granted summary judgment in favor of Dr. Blue

upon Ms. Browning's claim for malpractice. See Civ. R. 56. Ms. Browning's first and third assignments of error with respect to Dr. Blue are overruled.

However, the limitations period on a claim for loss of consortium is four years, R.C. 2305.09, and it begins to run on the date that the limitations period begins to run on the spouse's medical malpractice action. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1. As the limitations on Ms. Browning's claim began to run no later than August 1987, and the complaint was filed on April 17, 1989, it was error for the trial court to grant summary judgment to Dr. Blue on Mr. Browning's loss of consortium claim. Mr. Browning's first and third assignments of error are sustained.

Hospitals are not generally liable for the alleged negligence of physicians who have been granted staff privileges but who are not hospital employees. These physicians are considered independent contractors for whom the hospital generally bears no responsibility. The mere granting of staff privileges to an independent private physician, which the hospital may revoke under its procedures, does not establish the requisite level of authority or control to justify liability under the doctrine of respondeat superior. *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251.

It is well established that an employer must exercise reasonable care in the selection of a competent and careful independent contractor. In a hospital setting, this rule translates into a duty by the hospital only to grant and to continue staff privileges of the hospital to competent physicians. *Taylor v. Flower Deaconess Home & Hosp.*

(1922), 104 Ohio St. 61. Once a competent and careful physician has been granted staff privileges, the hospital will not thereafter be liable unless it has reason to know that the act of malpractice would most likely take place. That is, where a previously competent physician with staff privileges develops a pattern of incompetence, which the hospital should become aware of through its peer review process, the hospital must stand ready to answer for its retention of such a physician. *Albain, supra,* at 258.

A "cognizable event" occurs when a patient discovers or should have discovered both the injury and the negligence. *Allenius, supra.*

The critical inquiry is *when* should the appellant have had reason to believe that St. Elizabeth Hospital had failed to provide adequate supervision or review of Drs. Burt and Blue? There is no evidence before the court that the appellant knew or should have known that the hospital had failed to perform its legal duty toward her until she saw the West 57th Street television show in late 1988. Appellant filed her lawsuit against the hospital within six months of viewing that program. The trial court improperly granted summary judgment in favor of the hospital defendant. To the extent our opinion in *Hanks v. Burt* (Jan. 25, 1991), Mont. App. No. 12257 conflicts with this opinion, it is overruled.

In her second assignment, appellants contend that "inadmissible and/or hearsay evidence may not be considered by the court as a cognizable event under

Allenius." The Brownings contend the trial court improperly considered hearsay evidence in resolving the appellees' motions for summary judgment. Specifically, appellants object to the trial court's reference to the alleged letter of Dr. Montague to Dr. Blue regarding a flaw in Ms. Browning's surgery. Appellants contend that, since Dr. Montague's letter was not produced in evidence, testimony concerning the letter was "hearsay."

The appellees respond that the testimony was not hearsay because the contents of Dr. Montague's letter to Dr. Blue was not offered for the truth of the matters asserted therein, to wit, that there was a flaw in Dr. Blue's surgery, but whether Ms. Browning learned from Dr. Blue or Dr. Montague about such an allegation. Ms. Browning admitted in her deposition that Dr. Blue reported to her in June 1987 that Dr. Montague informed him there was a flaw in Ms. Browning's surgery. (Dep. 19). The evidence was properly admitted as relevant to appellant's state of mind in August 1987. See Evid. R. 803(3). This assignment is overruled.

The judgment of the trial court will be Affirmed as to Ms. Browning's medical malpractice claims against Dr. Blue, Reversed as to Mr. Browning's loss of consortium claim against Dr. Blue, and Reversed as to St. Elizabeth Medical Center. The matter will be Remanded for further proceedings consistent with this opinion.

FAIN, P.J., and WILSON, J., concur.

Copies mailed to:

Marylee Gill Sambol
Frank C. Woodside, III
John E. Schlosser
K.C. Green
Clara Sue Miller
Neil F. Freund
Robert N. Snyder
Earl H. Moore, Jr.
Hon. W. Erwin Kilpatrick

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CONEY MITCHELL Plaintiff-Appellant	:	CASE NO. 12244
vs.	:	
JAMES C. BURT, M.D., ET AL Defendants-Appellees	:	

OPINION

Rendered on the 26th day of August, 1991

FRANK WOODSIDE, 511 Walnut Street, 2100 Fountain Square Plaza, Cincinnati, Ohio 45202-3017
Attorney for Defendant-Appellee St. Elizabeth Medical Center

MARYLEE GILL SAMBOL, 109 North Broadway Avenue, Olde Towne Professional Building, Trotwood, Ohio 45426
Attorney for Plaintiff-Appellant

WILSON, J.

The plaintiff-appellant, Coney Mitchell, filed a medical malpractice complaint on December 14, 1988. She alleged that she was injured when James Burt, M.D. performed unnecessary experimental surgery on her on January 23, 1985, without her consent. Ms. Mitchell also

alleged that the defendant-appellee, St. Elizabeth Medical Center, improperly allowed Dr. Burt to perform the surgery at its hospital where Dr. Burt had staff privileges.

Ms. Mitchell has appealed from the order of the trial court sustaining the hospital's motion for summary judgment. There are four assignments of error.

1.

THE TRIAL COURT ERRED BY FINDING THAT THE PLAINTIFF'S STATUTE OF LIMITATIONS COMMENCED TO RUN IN DECEMBER 1985 AT THE LATEST, WHEN THE PHYSICIAN-PATIENT RELATIONSHIP DID NOT TERMINATE UNTIL 1987.

2.

THE COURT MUST REVERSE THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGMENT BECAUSE, TAKING THE EVIDENCE IN LIGHT MOST FAVORABLE TO MS. MITCHELL THERE WAS A GENUINE ISSUE AS TO WHEN A "COGNIZABLE EVENT" OCCURRED.

3.

THE FRAUDULENT CONDUCT OF DEFENDANT ST. ELIZABETH MEDICAL CENTER ABSOLUTELY ESTOPS AND BARS THE DEFENDANT FROM RAISING THE STATUTE OF LIMITATIONS AS A DEFENSE.

4.

OHIO REVISED CODE 2305.11(B) IS UNCONSTITUTIONAL AS APPLIED TO MS. MITCHELL.

The parties agree that plaintiff's claim against the hospital is a "medical claim" as defined in R.C. 2305.11(D)(3) and is a malpractice claim. They further agree that R.C. 2305.11(B)(1) requires that "an action upon a medical * * * claim shall be commenced within one year after the action accrued." The parties differ as to when the action accrued.

The plaintiff argues that R.C. 2305.11(B) is unconstitutional as applied to her. In support of her argument the plaintiff has cited us to *Hardy v. VerMeulen* (1987), 32 Ohio St. 3d 45. In this case, Hardy did not discover the malpractice until approximately ten years after the physician-patient relationship ended. The trial court dismissed his claim because R.C. 2305.11(B)(a) provides that in no event shall a medical malpractice action be commenced more than four years after the act or omission which constitutes the malpractice. In a four to three opinion, the Supreme Court of Ohio held:

> R.C. 2305.11(B), as applied to bar claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.

Ms. Mitchell filed her complaint less than four years after her operation. Her claim does not involve the four year statute.

The fourth assignment of error is overruled.

In her third assignment of error, the plaintiff contends that the hospital's fraud bars or estops the hospital from raising the statute of limitations as a defense. The

claim against the hospital sounds in negligence and contains no averments of fraud as required by Civ. R. 9(B).

The fourth assignment of error is overruled.

The hospital's motion for summary judgment was supported by the deposition of Coney Mitchell. Ms. Mitchell filed an affidavit contra the motion in which she stated that she was not aware of any medical malpractice until she became aware of the West 57th Street tv program of October 30, 1988. Her complaint was filed approximately seven weeks later.

A cause of action for medical malpractice accrues when a "cognizable event" occurs or when the physician-patient relationship terminates, whichever is last to occur. *Allenius v. Thomas* (1987), 42 Ohio St. 3d 131. *Herr v. Robinson Memorial Hosp.* (1990), 49 Ohio St. 3d 6.

Ms. Mitchell's affidavit establishes the material fact that she did not discover the alleged negligence on the part of the hospital until after she saw the West 57th Street tv program. Nothing in the record suggests that the plaintiff should have discovered the alleged negligence of the hospital prior to seeing the program.

The summary judgment in favor of the hospital should not have been granted. *Browning v. Burt* (Aug. 20, 1991), Mont. App. No. 12176, unreported.

We reverse and remand for further proceedings.

BROGAN, J., and WOLFF, J., concur.

Copies mailed to:

Frank Woodside
Marylee Gill Sambol
Hon. William MacMillan, Jr.

IN THE COMMON PLEAS OF
MONTGOMERY COUNTY, OHIO

JIMMIE DEAN BROWNING, et al.,	:	CASE NO. 89-1341
Plaintiffs,	:	(Judge W. Erwin Kilpatrick)
-vs-	:	
JAMES BURT, M.D., et al.,	:	DECISION
Defendants.	:	(Filed December 5, 1989)

This case is before the Court on a motion for summary judgment made by Defendant St. Elizabeth Medical Center on the ground that the action against it is barred by the Statute of Limitations.

This case was commenced against James Burt, M.D., Max Blue, M.D., for medical malpractice and against St. Elizabeth Medical Center for inadequate peer review. After surgery was performed on Plaintiff 16 times by the Defendant Doctors or one of them in Defendant St. Elizabeth Medical Center.

St. Elizabeth Medical Center has moved the Court for summary judgment on the ground that the action against it is barred by the statute of limitations.

Section 2305.11(B)(1) provides in pertinent part:

> [A]n action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued. . . .

The Supreme Court of Ohio in *Allenius v. Thomas,* 42 Ohio St. 3d 131, 133 says:

> "In *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St. 3d 1, 516 N.E. 2d 204, paragraph one of the syllabus, we established a three-prong test for determining the accrual date of "resulting injury" when applying the statute of limitations under R.C. 2305.11(A). In *Hershberger,* we held:
>
> " * * * [T]he trial court must look to the facts of the particular case and make the following determinations: when the injured party became aware, or should have become aware, of the extent and seriousness of his condition; whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition. * * * "
>
> "Admittedly, "extent and seriousness" are not terms of art and, therefore, do not lend themselves to easily discernible definitions. Since the three prongs of *Hershberger* overlap considerably, we believe that the best manner in which to explain "extent and seriousness of his condition" is to combine the three prongs. Thus, we now hold that the "extent and seriousness of his condition" language of the test set fourth in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St. 3d 1, 516 N.E. 2d 204, paragraph one of the syllabus, requires that there be an occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously

rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Moreover, we do not believe that a patient must be aware of the full extent of the injury before there is a cognizable event. It is enough that some noteworthy event, the "cognizable event," has occurred which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place.

If a patient believes, because of harm she has suffered, that her treating medical professional has done something wrong, such a fact is sufficient to alert a plaintiff "' * * * *Graham vs. Hansen* (1982), 128 Cal. App. 3d 965, 973, 180 Cal. Rptr. 604, 609."

Plaintiff says in her affidavit submitted in opposition to the motion for summary judgment:

"1. I am the plaintiff in the above entitled action.

2. After Dr. Max Blue performed sixteen (16) surgeries on me, I was very upset and angry with him, because he kept telling me that each additional surgery would make me well and I did not get any better after the surgeries.

3. I was also angry with Dr. Blue, because I became aware that he destroyed some of my records which were in his office.

I did not know or believe prior to seeing the West 57th Street program, that the surgeries performed on me by Dr. Blue and

Dr. Burt were unnecessary and/or experimental."

Plaintiff's deposition, which is used to support Defendant's motion is replete with indications that Plaintiff knew something was wrong.

Mrs. Browning's deposition shows that Drs. Burt and Blue treated and operated on Mrs. Browning between 1982 and 1986 for inability to void urine, urinary incontinence, bladder problems and infections, sexual problems and kidney problems which worsened.

In June, 1987, Mrs. Browning went to the Cleveland Clinic and they sent back a report.

"A. Yes, Dr. Blue had talked to that doctor on the phone and that doctor stated that there was a flaw in my surgery.

Q. And that would have been in June of 1987?

A. Yes.

Q. So, according to your testimony, this Dr. Montague – what did he say to you?

A. He told me that I was voiding pretty good and that he thought that I should go for some counseling because I wasn't willing to accept my condition or change my lifestyle or something. Whatever Dr. Blue called up and told him and –

Q. What did you tell Dr. Montague?

A. I told him that I thought that something was wrong, you know, from the surgery I'd had, that I didn't get over it an [sic] when he took my kidney out, I thought I wouldn't have any more problems.

Q. And your kidney was taken out in August of 1986?

With regard to the 1982 surgery we find at page 56 of the transcript:

"Q. And you became aware of that probably shortly after the surgery, didn't you?

A. Yes. When I – when he took that catheter out and I couldn't go is when I became aware of I had problems then.

Q. And that condition or those conditions, your problems with your sex life, problems with infections, the problems with your kidneys, the problems with your bladder, and your right flank pain, they've all continued on since that surgery in 1982 on a continuous basis from then until today?

A. I didn't have that flank pain until Dr. Blue operated on my kidney.

Q. In 1986?

A. Right."

At page 33 of Plaintiff's deposition we find:

"Q. We know that you told Blue that he committed malpractice on you sometime between June of '87 and August of '87?

A. Yes."

From these bits of testimony and numerous others spread throughout her deposition the Court concludes that Mrs. Browning knew at the latest in August, 1987, that she had problems that required further inquiry when

she told Dr. Blue he had committed malpractice on her. After she had a pelvic examination in June, 1987, Dr. Montague put in a letter that there was a "flaw" in her surgery, that she knew about. The continuing worsening of symptoms culminated by being informed that there was a "flaw" in her surgery is a "cognizable event" which did lead to Mrs. Browning telling Dr. Blue that he had "committed malpractice" on her and should have placed her on notice to pursue her remedies, but she did not do until April 17, 1989.

The Court concludes that there is no genuine issue of material fact and that Defendant St. Elizabeth Medical Center is entitled to judgment as a matter of law because the claim against it was filed more than 1 year after Plaintiff was put on notice by a "cognizable event" to pursue her claims, *Allenius v. Thomas*, 42 Ohio St. 3d 131, 133 and Section 2305.11B, Ohio Revised Code.

Judgment will be awarded to the moving Defendant at Plaintiff's cost. Defense counsel should prepare and circulate an appropriate entry for signature.

SO ORDERED:

_____

W. ERWIN KILPATRICK, JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

MARYLEE GILL SAMBOL, Attorney for Plaintiffs, 109 N. Broadway Avenue, Trotwood, Ohio 45426

FRANK C. WOODSIDE, III/MARK A. VANDER LAAN/K.C. GREEN/CLARA SUE ROSS, Attorneys for Defendant, St. Elizabeth Medical Center, 500 Courthouse Plaza, S.W., 10 North Ludlow Street, Dayton, Ohio 45402 (513) 228-8012

NEIL F. FREUND, Attorney for Defendant, Max W. Blue, Jr., M.D., 1000 Talbott Tower, Dayton, Ohio 45402 (513) 222-2424

EARL H. MOORE, Attorney for Defendant, James Burt, M.D., 333 Hulman Building, Dayton, Ohio 45402

JAMES BURT, M.D., Defendant, 15369 Iona Lake Drive, Ft. Myers, Florida 33908

TOM TUNNEY, Bailiff

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CONEY MITCHELL,	: CASE NO. 88-4468
Plaintiff,	: (Judge William MacMillan, Jr.)
-vs-	:
JAMES BURT, M.D., et al.,	: DECISION AND ORDER SUSTAINING MOTION
Defendants.	: FOR SUMMARY JUDGMENT AND JUDGMENT ENTRY DISMISSING CLAIMS AGAINST ST. ELIZABETH MEDICAL CENTER
	: (Filed January 12, 1989)

The Defendant, St. Elizabeth Medical Center, requests this Court to grant a summary judgment in its favor and against the Plaintiff pursuant to Rule 56 of the Ohio Rules of Civil Procedure. The Court having considered the pleadings, the affidavits, the deposition of Coney Mitchell and the memoranda of counsel finds that the motion for summary judgment filed by St. Elizabeth Medical Center should be SUSTAINED.

The Plaintiff's complaint sets forth four claims against the Defendant, James C. Burt, M.D. The complaint sets forth three enumerated claims against St. Elizabeth Medical Center, which claims may be characterized as the hospital's negligence in granting staff privileges to James C. Burt and failing to review his qualifications from time to time so that it failed to protect his patients who were

undergoing surgery at the St. Elizabeth Medical Center. The Plaintiff claims that the hospital knew of the experimental nature of the surgery that Dr. Burt performed at St. Elizabeth Medical Center. The Plaintiff further claims that it should have known that he was performing surgeries outside his areas of expertise and that the hospital was aware of numerous malpractice suits and injuries that occurred to patients who underwent the same type surgery by Dr. Burt.

St. Elizabeth Medical Center filed an answer asserting that the Plaintiff's claims against it should be dismissed because the Plaintiff has failed to file suit within the appropriate time and that Statutes of Limitations require the causes of action against St. Elizabeth Hospital to be dismissed.

R.C. Section 2305.11(B)(1) provides in part:

> " . . . and action upon a medical, dental, optometric or chiropractic claim shall be commenced within one year after the action occurred . . . "

R.C. Section 2305.11(D)(3) defines a medical claim as:

> " . . . any claim that is asserted in any civil action against a physician, podiatrist or hospital against any employee or agent of a physician, podiatrist or hospital or against a registered nurse or physical therapist and that arises out of the medical diagnosis, care or treatment of any person." (emphasis added.)

The Defendants' memorandum assumes that R.C. Section 2305.11(B)(1) applies to the claims of the Plaintiff. If that is so, then the Statute of Limitations has clearly run prior to the filing of this action on December 14, 1988.

The accrual date for the commencement of the running of the Statute of Limitations has been established in the cases of Hershberger v. Akron City Hospital, (1987) 34 Ohio St. 3d 1 and Allenius v. Thomas, (1989) 42 Ohio St. 3d 131. Applying these standards, the Court finds that the commencement of the running of the Statute of Limitations in this case was in December, 1985 at the latest.

In January, 1985, the Plaintiff underwent surgery by Dr. Burt at St. Elizabeth Medical Center. According to the Plaintiff's answers in her deposition, the pre-existing medical condition of urinary incontinence and bowel problems worsened after the January, 1985 surgery. She further claims that her inability to engage in sexual intercourse after the January, 1985 surgery was known to her within a few months after that surgery. Within the same few months after January, 1985, she became aware of the unusual appearance of her vaginal area. It is undisputed that all these problems either became worse or originated with the January, 1985 surgical procedure performed at St. Elizabeth Medical Center and were known and experienced before the end of 1985. It is further certain that the Plaintiff had no other contact with St. Elizabeth Medical Center after the 1985 surgery.

The Plaintiff's claims against St. Elizabeth Medical Center depend on when the injured party became aware, or should have become aware of the extent and seriousness of her condition; that such condition was related to a specific professional medical service and whether such condition would put a reasonable person on notice of the need for further inquiry as to the cause of such condition. These three conditions were set forth in Hershberger v. Akron City Hospital, supra and the phrase of "extent and

seriousness of his condition" was further explained in Allenius v. Thomas, supra by requiring the occurrence of a cognizable event that should place the patient on notice of the need to pursue possible remedies.

Looking for one or more cognizable events that would require a reasonable person to believe an improper medical procedure took place so as to require some investigation and pursuit of a remedy, the Court finds that the unusual appearance of the vagina and the inability to engage in sexual intercourse is such an event that took place in the middle months of 1985. The accompanying urinary incontinence and blocked bowels also were known during the middle months of 1985.

The Court finds that an action upon a medical claim against St. Elizabeth Medical Center was not commenced within one year after the action accrued and therefore under R.C. 2305.11(B)(1) the claims should be DISMISSED. The Court further finds that the claims of the Plaintiff for bodily injury not related to a medical claim must be DISMISSED because the action was not brought within the two years after the cause thereof arose pursuant to R.C. 2305.10. This case was filed December 14, 1988.

It is hereby ORDERED that the motion for summary judgment filed by St. Elizabeth Medical Center be SUSTAINED and it is further ORDERED that judgment be awarded to St. Elizabeth Medical Center and against the Plaintiff and the Plaintiff's action is hereby DISMISSED at Plaintiff's cost.

This ORDER is not a final order due to the courts' contemparaneous [sic] decision vacating the judgment against James Burt, M.D.

SO ORDERED:

_____

WILLIAM MACMILLAN, JR., JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

MARYLEE GILL SAMBOL, Attorney for Plaintiffs, 109 North Broadway Avenue, Trotwood, Ohio 45426

FRANK C. WOODSIDE, III/MARK A. VANDER LAAN/K.C. GREEN/CLARA SUE ROSS, Attorneys for Defendant, St. Elizabeth Medical Center, 500 Courthouse Plaza, S.W., 10 North Ludlow Street, Dayton, Ohio 45402 (513) 461-4440

EARL H. MOORE, Attorney for Defendant, James Burt, M.D., 367 W. Second Street, Suite 110, Dayton, Ohio 45402

RAYMOND JOHNSON, Bailiff

Not Reported in N.E.2d
(Cite as: 1991 WL 6312 (Ohio App.))

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS
IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

**Theda HANKS, et al,
Plaintiffs-Appellants,**

v.

**James C. BURT, M.D., et al,
Defendants-Appellees.**

No. 12257.

Court of Appeals of Ohio, Montgomery County.

Jan. 25, 1991.

Marylee Gill Sambol, Trotwood, for plaintiff-appellant.

Frank C. Woodside, III, Clara Sue Miller, Cincinnati, for defendant-appellee St. Elizabeth Medical Center.

Neil F. Freund, Robert N. Snyder, Dayton, for defendant-appellee.

OPINION

WILSON, Judge.

*1 The plaintiffs, Theda Hanks and Howard Hanks, filed a medical malpractice complaint on February 8, 1989. The plaintiffs alleged that the defendants, James Burt, M.D., and Max Blue, M.D., performed unnecessary experimental surgery on Mrs. Hanks on June 1, 1984

without her consent and that the defendant, St. Elizabeth Medical Center, improperly allowed the individual defendants to perform the surgery.

The plaintiffs have appealed from the order granting summary judgment in favor of Dr. Blue and the hospital based upon the statute of limitations. There are three assignments of error:

THIS COURT MUST REVERSE THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGMENT BECAUSE, TAKING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO MS. HANKS THERE WAS A GENUINE ISSUE AS TO WHEN A "COGNIZABLE EVENT" OCCURRED.

THE FRAUDULENT CONDUCT OF DEFENDANT ST. ELIZABETH MEDICAL CENTER ABSOLUTELY ESTOPS AND BARS THE DEFENDANT FROM RAISING THE STATUTE OF LIMITATIONS AS A DEFENSE.

O.R.C. 2305.11(B) IS UNCONSTITUTIONAL AS APPLIED TO MS. HANKS.

In support of their third assignment of error, the plaintiffs have cited Hardy v. Ver Meulen (1987), 32 Ohio St.3d 45. In this case Mr. Hardy did not discover his malpractice injury until approximately ten years after the physician-patient relationship ended. The Ohio Supreme Court held:

R.C. 2305.11(B), as applied to bar claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.

The facts, rationale and analysis in the Hardy case are simply not on point in Mrs. Hanks' claim. The third assignment of error is overruled.

The appellants' motions for summary judgment were supported by the deposition of Mrs. Hanks.

After reviewing the evidentiary materials filed in support of and contra the summary judgment motions, the trial court made the following findings in the decision sustaining the appellees' motions:

It is undisputed that prior to the surgery of June 1, 1984, the Plaintiff suffered no significant medical problems concerning bladder infections, vaginal infections, incontinence, severe stomach pains and sexual disfunction. All of the Plaintiffs' complaints arose after the June 1, 1984 surgery performed by Dr. Burt and Dr. Max E. Blue, Jr. Each of the problems developed shortly after the surgery and the Plaintiff should have been aware well before the end of 1984 that her new medical problems were related to the June 1, 1984 surgery. It is further undisputed that the patient-physician relationship of the Plaintiff with Dr. Burt terminated sometime in December of 1984. It is further undisputed that Dr. Max Blue, M.D. did not see or treat the Plaintiff after June 1, 1984, when he assisted Dr. Burt in the surgery. The Plaintiff was not readmitted to St. Elizabeth Hospital after June 1, 1984. It is clear from the sworn testimony of the Plaintiff that she became aware that something was wrong with the surgery performed on June 1, 1984. She was aware that her resulting medical condition was related to the conduct of Dr. Burt during the June 1, 1984 surgery. That awareness occurred prior to December, 1984, and the part played by

Dr. Blue became evident to her and her husband in 1985 when the suit for collection of the surgical services of Dr. Blue was filed. From all the present facts presented to the Court it is clear that the Plaintiffs were well aware that the medical problems of Theda Hanks were the result of some improper medical treatment or surgery performed by Dr. Burt and Dr. Blue on June 1, 1984. That awareness was as early as December, 1984, and definitely prior to February 9, 1987.

*2 The statute of limitations on Mrs. Hanks' medical malpractice claim began to run when she discovered, or, in the exercise of reasonable diligence should have discovered the injury and malpractice. Oliver v. Kaiser Community Health Foundation (1983), 5 Ohio St.3d 111.

The "discovery rule" was clarified in Hershberger v. Akron City Hospital (1987), 34 Ohio St.3d 1. The first paragraph of the syllabus in this case provides:

In a medical malpractice action, for the purposes of determining the accrual date in applying the statute of limitations under R.C. 2305.11(A), the trial court must look to the facts of the particular case and make the following determinations: when the injured party became aware, or should have become aware, of the extent and seriousness of his condition; whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition.

The "discovery" rule was further refined in Allenius v. Thomas (1987), 42 Ohio St.3d 131.

The "extent and seriousness of his condition" language of the test set forth in Hershberger v. Akron City Hosp. (1987), 34 Ohio St.3d 1, 516 N.E.2d 204, paragraph one of the syllabus, requires that there be an occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Mrs. Hanks contends that a "cognizable event" did not occur until October 1988, when she learned from another physician that there was a causal connection between her medical condition and her surgery. In support of her argument she has cited us to Herr v. Robinson Memorial Hosp. (1990), 49 Ohio St.3d 6. The "cognizable event" in this case was when Mr. Herr was advised of the malpractice by a second doctor.

The defendant doctor attributed Mr. Herr's back pain to a bad disc. Mr. Herr noticed slight improvement after the defendant removed a disc; however, his condition and pain subsequently worsened. He was assured by one of his doctors that "these things take time." Herr was subsequently advised by his second doctor that his back problems were caused from a broken vertebra. Herr experienced a total recovery after a spinal fusion operation.

Based upon these facts the court concluded that "pain alone cannot be the cognizable event. However, we do not intimate that pain alone may never be a cognizable event, but given the particular facts of the case before this

court, continued pain would not be considered a cognizable event."

The following statement appears in the body of the opinion in Allenius v. Thomas supra: If a patient believes, because of harm she has suffered, that her treating medical professional has done something wrong, such a fact is sufficient to alert a plaintiff " ' * * * to the necessity for investigation and pursuit of her remedies. * * * ' "

*3 We agree with the trial court that Mrs. Hanks' significant medical problems were a cognizable event or events, and that Mrs. Hanks was aware of the malpractice prior to February 9, 1987.

The first assignment of error is overruled.

In their second assignment of error, the appellants contend that the hospital's fraudulent conduct bars the hospital from raising the defense of the statute of limitations.

The appellants' complaint sounds in negligence and contains no averments of fraud as required by Civ.R. 9(B). The second assignment of error is overruled.

We affirm.

BORGAN and WOLFF, JJ., concur.

END OF DOCUMENT

Related Ohio Cases Pending at the Time of Publication of *Browning v. Burt*, 66 Ohio St. 3d 544, 613 N.E.2d 993 (1993)

[Note: Cases in which summary judgment was granted to Saint Elizabeth Medical Center pursuant to Ohio Revised Code § 2305.11(B)(1) (statute of limitations) are denoted with an asterisk (*)]

1. ***Monna Ball v. James C. Burt, M.D. and SEMC***, No. 89-555 (Montgomery Cty., Ohio C.P.).

2. ***Kathleen Bergman and Thomas Bergman v. James Burt, M.D. and SEMC***, No. 89-2644 (Montgomery Cty., Ohio C.P.).

3. ***Edna L. Brown and Jimmie L. Brown v. James Burt, M.D. and SEMC***, No. 89-4292 (Montgomery Cty., Ohio C.P.).

4.* ***Jimmie Dean Browning and Lawrence Browning v. James Burt, M.D. and Max Blue, M.D. and SEMC***, No. 89-1341 (Montgomery Cty., Ohio C.P.).

5. ***Patricia Chappell v. James Burt, M.D. and SEMC***, No. 89-3193 (Montgomery Cty., Ohio C.P.).

6. ***Dorothy Coterel and David Coterel v. James Burt, M.D. and SEMC***, No. 89-4112 (Montgomery Cty., Ohio C.P.).

7. ***Cathy Cox and Doug Cox v. James Burt, M.D. and SEMC***, No. 89-1339 (Montgomery Cty., Ohio C.P.).

8. ***Beverly W. Drake and Ralph Drake v. SEMC,and James C. Burt, M.D.***, No. 89-4184 (Montgomery Cty., Ohio C.P.).

9. ***Judy K. Dresher and Larry E. Dresher v. James Burt, M.D. and SEMC***, No. 89-3089 (Montgomery Cty., Ohio C.P.).

10. ***Phyllis Eckenrode and Gary Eckenrode v. James Burt, M.D., Max Blue, M.D., and SEMC***, No. 89-3641 (Montgomery Cty., Ohio C.P.).

11.* ***Lidia Eiford v. James Burt, M.D. and SEMC***, No. 89-4114 (Montgomery Cty., Ohio C.P.).

12. ***Leola R. Elmore v. James Burt, M.D. and SEMC***, No. 89-3191 (Montgomery Cty., Ohio C.P.).

13. ***Bonnie Ginter v. James Burt, M.D. and SEMC***, No. 89-4113 (Montgomery Cty., Ohio C.P.).

14. ***Lucille George, fka Lucille Hoskins v. James Burt, M.D. and SEMC***, No. 90-4583 (Montgomery Cty., Ohio C.P.).

15.* ***Karla Hardegan and Theodore H. Hardegan v. James Burt, M.D. and SEMC***, No. 89-3090 (Montgomery Cty., Ohio C.P.).

16. ***Geraldine Harness and William Harness v. James C. Burt, M.D. and SEMC***, No. 89-498 (Montgomery Cty., Ohio C.P.).

17. ***Ann Harrison v. James Burt, M.D. and SEMC***, No. 89-2678 (Montgomery Cty., Ohio C.P.).

18. ***Marva Hopkins and Nathaniel Hopkins v. James Burt, M.D., James Matthews, M.D. and SEMC***, No. 89-3890 (Montgomery Cty., Ohio C.P.).

19. ***Litha Jeffrey v. James Burt, M.D. and SEMC***, No. 89-3047 (Montgomery Cty., Ohio C.P.).

20. ***Carol A. Johnson and Clyde H. Johnson v. James Burt, M.D., Max Blue, M.D., Arthur R. Schramm, M.D. and SEMC***, No. 89-3821 (Montgomery Cty., Ohio C.P.).

21.* ***Rose Hobbs Kelsay v. James Burt, M.D. and SEMC***, No. 89-1342 (Montgomery Cty., Ohio C.P.).

22.* ***Norma L. Kennard and Harold Kennard v. James Burt, M.D. and SEMC,*** No. 89-3891 (Montgomery Cty., Ohio C.P.).

23.* ***Lottie Koth and Edward Koth v. James Burt, M.D. and SEMC,*** No. 89-2613 (Montgomery Cty., Ohio C.P.).

24. ***Margaret Miles v. James Burt, M.D. and SEMC and Seiler-Scharf Anesthesiologists, Inc.*** No. 89-4111 (Montgomery Cty., Ohio C.P.).

25.* ***Coney Mitchell v. James Burt, M.D. and SEMC,*** No. 88-4468 (Montgomery Cty., Ohio C.P.).

26. ***Ruby Moore v. James Burt, M.D. and SEMC and Seiler-Scharf Anesthesiologists, Inc.,*** No. 89-1321 (Montgomery Cty., Ohio C.P.).

27. ***Cheryl Morgan and Orville L. Morgan, Jr. v. James Burt, M.D. and SEMC,*** No. 89-4293 (Montgomery Cty., Ohio C.P.).

28. ***Mary Nelson v. James Burt, M.D. and Max Blue, M.D. and SEMC,*** No. 89-3088 (Montgomery Cty., Ohio C.P.).

29.* ***Sharon Owens and Bobby R. Owens v. James Burt, M.D. and SEMC,*** No. 89-3984 (Montgomery Cty., Ohio C.P.).

30. ***Mary E. Peters and Donald R Peters v. James Burt, M.D. and SEMC,*** No. 89-3146 (Montgomery Cty., Ohio C.P.).

31. ***Jane Phillips v. James Burt, M.D., Inc. and Gynecology South and SEMC,*** No. 89-1004 (Montgomery Cty., Ohio C.P.).

32. ***Barbara Roberts and James E. Roberts v. James Burt, M.D. and SEMC,*** No. 89-3111 (Montgomery Cty., Ohio C.P.).

33. *Jane E. Roberts and Don E. Roberts v. James Burt, M.D. and SEMC*, No. 89-3889 (Montgomery Cty., Ohio C.P.).

34. *Elizabeth Sanders v. James Burt, M.D. and SEMC*, No. 89-3016 (Montgomery Cty., Ohio C.P.).

35.* *Audrey Smith v. James Burt, M.D. and SEMC*, No. 89-2614 (Montgomery Cty., Ohio C.P.).

36. *Jacqueline Smith v. James Burt, M.D. and SEMC*, No. 89-3893 (Montgomery Cty., Ohio C.P.).

37. *Margaret Thomas and Donald Thomas v. James C. Burt, M.D. and SEMC*, No. 89-497 (Montgomery Cty., Ohio C.P.).

38. *Joni L. Thompson and Thomas E. Thompson v. James Burt, M.D. and SEMC*, No. 89-3145 (Montgomery Cty., Ohio C.P.).

39. *Eileen Tomlin and Thomas Tomlin v. James C. Burt, M.D. and SEMC and Seiler-Scharf Anesthesiology, Inc.*, No. 89-1340 (Montgomery Cty., Ohio C.P.).

40. *Ginger Tripoli and Roger Paul Tripoli c. [sic] James Burt, M.D. and SEMC*, No. 89-3642 (Montgomery Cty., Ohio C.P.).

41.* *Lillie White and Jimmi L. White v. James Burt, M.D. and SEMC*, No. 89-3192 (Montgomery Cty., Ohio C.P.).

42. *Sheila Wilson v. James Burt, M.D. and SEMC*, No. 89-1571 (Montgomery Cty., Ohio C.P.).

43.* *Beverly Diane Yearyean v. James Burt, M.D. and SEMC*, No. 89-3892 (Montgomery Cty., Ohio C.P.).

APPENDIX B

THE HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986, 42 U.S.C. § 11101 ET SEQ.

§ 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

§ 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section –

(A) The professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981 et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C [15 U.S.C.A. § 15c], where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing

information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of[1], for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(Pub.L. 99-660, Title IV, § 411, Nov. 14, 1986, 100 Stat. 3784; Pub.L. 100-177, Title IV, § 402(c), as added Pub.L. 101-239, Title VI, § 6103(e)(6)(A) Dec. 19, 1989, 103 Stat. 2208.)

---

§ 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken –

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

---

[1] So in original.

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) **Adequate notice and hearing**

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) **Notice of proposed action**

The physician has been given notice stating –

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) **reasons for the proposed action,**

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating –

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) –

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) –

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right –

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right –

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as –

(1) requiring the procedures referred to in subsection (a)(3) of this section –

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub.L. 99-660, Title IV, § 412, Nov. 14, 1986, 100 Stat. 3785.)

---

§ 11113. Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially

prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

(Pub.L. 99-660, Title IV. § 413, Nov. 14, 1986, 100 Stat. 3787.)

---

§ 11114. Guidelines of the Secretary

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.

(Pub.L. 99-660, Title IV, § 414, Nov. 14, 1986, 100 Stat. 3787.)

---

§ 11115. Construction

(a) In general

Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this part.

(b) Scope of clinical privileges

Nothing in this subchapter shall be construed as requiring health care entities to provide clinical privileges

to any or all classes or types of physicians or other licensed health care practitioners.

(c) Treatment of nurses and other practitioners

Nothing in this subchapter shall be construed as affecting, or modifying any provision of Federal or State law, with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Treatment of patient malpractice claims

Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity.

(Pub.L. 99-660, Title IV, § 415, Nov. 14, 1986, 100 Stat. 3787; Pub. L. 100-177, Title IV, § 402(c), as added Pub.L. 101-239, Title VI, § (e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

SUBCHAPTER II – REPORTING OF INFORMATION

§ 11131. Requiring reports on medical malpractice payments

(a) In general

Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof.

(b) Information to be reported

The information to be reported under subsection (a) of this section includes –

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitioner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

(c) Sanctions for failure to report

Any entity that fails to report information on a payment required to be reported under this section shall be

subject to a civil money penalty of not more than $10,000 for each such payment involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(d) Report on treatment of small payments

The secretary shall study and report to Congress, not later than two years after November 14, 1986, on whether information respecting small payments should continue to be required to be reported under subsection (a) of this section and whether information respecting all claims made concerning a medical malpractice action should be required to be reported under such subsection.

(Pub.L. 99-660, Title IV, § 421, Nov. 14, 1986, 100 Stat. 3788.)

---

§ 11132. Reporting of sanctions taken by boards of medical examiners

(a) In general

(1) Actions subject to reporting

Each Board of Medical Examiners –

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or place on probation a physician, for reasons relating to the physician's professional competence or professional conduct, or

(B) to which a physician's license is surrendered,

shall report, in accordance with section 11134 of this title, the information described in paragraph (2).

(2) Information to be reported

The information to be reported under paragraph (1) is –

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Failure to report

If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (a) of this section, the Secretary shall designate another qualified entity for the reporting of information under section 11133 of this title.

(Pub.L. 99-660, Title IV, § 422, Nov. 14, 1986, 100 Stat. 3789.)

---

§ 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by health care entities

(1) On physicians

Each health care entity which –

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician –

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society,

shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).

(2) Permissive reporting on other licensed health care practitioners

A health care entity may report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3) in the case of a licensed health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported

The information to be reported under this subsection is –

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners

Each Board of Medical Examiners shall report, in accordance with section 11134 of this title, the information reported to it under subsection (a) of this section and known instances of a health care entity's failure to report information under subsection (a)(1) of this section.

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111(a)(1) of this title if the Secretary publishes the name of the entity under section 11111(b) of this title.

(2) Board of Medical Examiners

If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b) of this section, the Secretary shall designate another qualified entity for the reporting of information under subsection (b) of this section.

(d) References to Board of Medical Examiners

Any reference in this subchapter to a Board of Medical Examiners includes, in the case of a Board in a State that fails to meet the reporting requirements of section 11132(a) of this title or subsection (b) of this section, a reference to such other qualified entity as the Secretary designates.

(Pub.L. 99-660, Title IV, § 423, Nov. 14, 1986, 100 Stat. 3789.)

---

§ 11134. Form of reporting

(a) Timing and form

The information required to be reported under sections 11131, 11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

The information required to be reported under sections 11131, 11132(a), and 11133(b) of this title shall be reported to the Secretary, or, in the Secretary's discretion, to an appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11132(b) of this title shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

(Pub.L. 99-660, Title IV, § 424, Nov. 14, 1986, 100 Stat. 3790.)

---

§ 11135. Duty of hospitals to obtain information

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title), on and after the date information is first required to be reported under section 11134(a) of this title –

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this subchapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this subchapter concerning any physician or

such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times.

(b) failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

(Pub.L. 99-660, Title IV, § 425, Nov. 14, 1986, 100 Stat. 3790.)

---

§ 11137. Miscellaneous provisions

(a) Providing licensing boards and other health care entities with access to information

The Secretary (or the agency designated under section 11134(b) of this title shall, upon request, provide information reported under this subchapter with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health

care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information

(1) In general

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this part that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations

Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(3) Use of information

Subject to paragraph (1), information provided under section 11135 of this title and subsection (a) of this section is intended to be used solely with respect to activities in the furtherance of the quality of health care.

(4) Fees

The Secretary may establish or approve reasonable fees for the disclosure of information under this section or section 11136 of this title. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 11134(b) of this title) to cover such costs.

(c) Relief from liability for reporting

No person or entity (including the agency designated under section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under

subsection (a) of this section[1] without knowledge of the falsity of the information contained in the report.

(d) Interpretation of information

In interpreting information reported under this subchapter, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

(Pub.L. 99-660, Title IV, § 427, Nov. 14, 1986, 100 Stat. 3791; Pub.L. 100-177, Title IV, § 402(a), (b), Dec. 1, 1987, 101 Stat. 1007.)

SUBCHAPTER III – DEFINITIONS AND REPORTS

§ 11151. Definitions

In this title:

(1) The term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other

---

[1] So in original. Amendment by section 402(a)(2)(B) of Pub.L. 100-177 failed to include a closing parenthesis.

licensed health care practitioner is permitted to furnish such care by a health care entity.

(4)(A) The term "health care entity" means –

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

(6) The terms "licensed health care practitioner" and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on –

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician –

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State which is primarily responsible for the licensing of the physician or provider to furnish health care services.

(Pub.L. 99-660, Title IV, § 431, Nov. 14, 1986, 100 Stat. 3792.)

APPENDIX C

SECTIONS OF THE OHIO REVISED CODE INVOLVED

Ohio Rev. Code § 2305.10 (Anderson 1991):

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury

which may be related to such exposure, whichever date occurs first.

Ohio Rev. Code § 2305.11 (Anderson Supp. 1992)

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B) (1) Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

(2) Except as to persons within the age of minority, or of unsound mind, as provided by section 2305.16 of the Revised Code:

(a) In no event shall any action upon a medical, dental, optometric, or chiropractic claim be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.

(b) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, notwithstanding the time when the action is determined to accrue under division (B)(1) of this section, any action upon that claim is barred.

(C) A civil action for unlawful abortion pursuant to section 2919.12 of the Revise Code shall be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority that is responsible for the operation of any hospital licensed or registered in the state, including, but not limited to, those which are owned or operated by the state, political subdivisions, any person, any corporation, or any combination thereof. "Hospital" also includes any person, corporation, association, board, entity, or authority that is responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty

and rendering advice, diagnosis, care, and treatment to individuals. "Hospital" does not include any hospital operated by the government of the United States or any of its branches.

(2) "Physician" means any person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person.

(4) "Podiatrist" means any person who is licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means any person who is licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim that is asserted in any civil action against a dentist, or against any employee or agent of a dentist, and that arises out of a dental operation or the dental diagnosis, care, or treatment of any person. "Dental claim" includes derivative claims for relief that

arise from a dental operation or the dental diagnosis, care, or treatment of a person.

(7) "Derivative claims for relief" include, but are not limited to, claims of a parent, guardian, custodian, or spouse of an individual who was the subject of any medical diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:

(a) Loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the parent, guardian, custodian, or spouse;

(b) Expenditures of the parent, guardian, custodian, or spouse for medical, dental, optometric, or chiropractic care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations provided to the individual who was the subject of the medical diagnosis, care, or treatment, the dental diagnosis, care, or treatment, the dental operation, the optometric diagnosis, care, or treatment, or the chiropractic diagnosis, care, or treatment.

(8) "Registered nurse" means any person who is licensed to practice nursing as a registered nurse by the state board of nursing.

(9) "Chiropractic claim" means any claim that is asserted in any civil action against a chiropractor, or against any employee or agent of a chiropractor, and that arises out of the chiropractic diagnosis, care, or treatment of any person. "Chiropractic claim" includes derivative claims for relief that arise from the chiropractic diagnosis, care, or treatment of a person.

(10) "Chiropractor" means any person who is licensed to practice chiropractic by the chiropractic examining board.

(11) "Optometric claim" means any claim that is asserted in any civil action against an optometrist, or against any employee or agent of an optometrist, and that arises out of the optometric diagnosis, care, or treatment of any person. "Optometric claim" includes derivative claims for relief that arise from the optometric diagnosis, care, or treatment of a person.

(12) "Optometrist" means any person licensed to practice optometry by the state board of optometry.

(13) "Physical therapist" means any person who is licensed to practice physical therapy by the physical therapy section of the Ohio occupational therapy, and physical therapy board.

Ohio Rev. Code § 2305.25 (Anderson Supp. 1992):

No hospital, no state or local society, and no individual who is a member or employee of any of the following committees shall be liable in damages to any person for any actions, omissions, decisions, or other conduct within the scope of the functions of the committee:

(A) A utilization review committee, quality assurance committee, or tissue committee of a hospital, a not-for-profit health care corporation which is a member of the hospital or of which the hospital is a member, or a community mental health center;

(B) A board or committee of a hospital or of a not-for-profit health care corporation which is a member of the hospital or which the hospital is a member reviewing professional qualifications or activities of the hospital medical staff or applicants for admission to the medical staff;

(C) A utilization committee of a state or local society composed of doctors of medicine or doctors of osteopathic medicine and surgery or doctors of podiatric medicine;

(D) A peer review committee of nursing home providers or administrators;

(E) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine and surgery, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or registered pharmacists;

(F) A peer review committee of a health maintenance organization that has at least a two-thirds majority of member physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient. For purposes of this division, "health maintenance organization" includes wholly-owned subsidiaries of a health maintenance organization.

(G) A peer review committee of any insurer authorized under Title XXXIX [39] of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

(H) A peer review committee of any insurer authorized under Title XXXIX [39] of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of a health care facility that has contracted with the insurer to provide health care services to insureds, which conduct adversely affects, or could adversely affect, the health or welfare of any patient.

Nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient.

This section shall also apply to any member of employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators of a peer review or professional standards review committee. No person who provides information under this section and provides such information without malice and in the reasonable belief that such information is warranted by the facts known to him shall be subject to suit for civil damages as a result thereof.

Ohio Rev. Code § 2305.251 (Anderson 1991):

Proceedings and records of all review committees described in section 2305.25 of the Revised Code shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care professional, a hospital, a not-for-profit health care corporation which is a member of the hospital or of which the hospital is a member, or other health care institution arising out of matters which are the subject of evaluation and review by the committee. No person in attendance at a meeting of a review committee or serving as a member of a review committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or member thereof. Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of a committee nor should any person

testifying before a committee or who is a member of the committee be prevented from testifying as to matters within his knowledge, but the witness cannot be asked about his testimony before the committee or opinion formed by him as a result of the committee hearing.

APPENDIX D

Not Reported in N.E.2d
(Cite as: 1991 WL 124428 (Ohio App.))

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Karen L. FAZZONE, Plaintiff-Appellant,

v.

WESTERN RESERVE CARE SYSTEM,
Defendant-Appellee.
No. 90 C.A. 72.
Court of Appeals of Ohio, Mahoning County.
July 2, 1991.

Civil Appeal from the Court of Common Pleas, Mahoning County, Case No. 89 CV 2664.

William E. Pfau, Jr., Youngstown, for plaintiff-appellant.

Marshall D. Buck, Youngstown, for defendant-appellee.

Before DONOFRIO, P.J., and COX and O'NEILL, JJ.

OPINION

DONOFRIO, Presiding Judge.

*1 This is an appeal from the Court of Common Pleas of Mahoning County, Ohio, from a judgment of dismissal of plaintiff-appellant Karen L. Fazzone's cause of action.

Appellant's complaint alleges that on or about December 29, 1987, appellant was admitted to defendant-appellee Western Reserve Care System's hospital for a bilateral breast reduction mammoplasty; that appellee hospital was negligent in failing to monitor and control

its operating room in which the surgery was performed causing appellant to suffer extensive infections in the incisional areas; and that there were other similar major infections to other patients that occurred on the same day in the same hospital operating room. Under the allegations in appellant's complaint and amended complaint, appellee hospital is charged in substance with failing to provide a proper and sterile operating room for surgeons on its staff.

Appellant asserts two assignments of error, the second of which is dispositive of the issue herein. It reads:

"The trial court erred in finding a claim for negligent maintenance of an operating room to be a 'medical claim'."

Appellant argues that her claim is not a medical claim or a malpractice claim so far as appellee hospital is concerned. Appellant contends that her claim is simply a claim that appellee hospital did not exercise ordinary care to ensure the cleanliness and sterility of its operating room so that surgeons on its staff could successfully perform surgery in the hospital. In short, appellant argues that a hospital providing a surgical suite for the performance of surgery by physicians upon patients is a housekeeping matter and therefore not within the contemplation of R.C. 2305.11(D)(3). Appellant concludes that her claim is a negligence claim and that the two-year statute of limitations applies, and no R.C. 2305.11, the one-year statute of limitations upon a medical claim.

The issue presented in this appeal, then, under the facts as presented by this case, is whether appellant's

claim is a medical claim under the statutes or a negligence claim in order to determine which statute of limitations applies.

R.C. 2305.11(B)(1) states:

"Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued * * * ."

R.C. 2305.11(D)(3) states:

" 'Medical claim' means any claim that is asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person. 'Medical claim' includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person." (Emphasis added.)

Appellant was admitted to the hospital for the purpose of undergoing a surgical procedure which required an open incision in the skin. As a result of the incision, it is alleged that an infection developed. The negligence of the hospital, if any, would have occurred as a result of a failure to provide a suitable operative suite for appellant's surgical procedure. The use of the surgical suite, and the equipment provided by the hospital is all incidental to the medical care and treatment rendered to appellant.

*2 The duty to exercise due care in the facts of the present action by appellant relate to the prevention and

the spread of infection in a hospital setting. As such, the "care" rendered by a hospital to its patient falls within the context of a "medical claim," as contemplated by the legislature in R.C. 2305.11(D)(3). As stated in 67 Ohio Jurisprudence 3d 80, Malpractice, Section 62:

"The Code defines a 'medical claim' as any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person." (Emphasis added.)

We conclude that the trial court's decision was correct and we, therefore, overrule appellant's second assignment of error.

Having determined that the one-year statute of limitations applies and the trial court's decision was correct in that regard, appellant's first assignment of error has been mooted as to the contention that the trial court determined a lack of jurisdiction because of the failure to file an affidavit of merit in support of the complaint.

For the foregoing reasons, we affirm the judgment of the trial court.

Judgment affirmed.

COX and O'NEILL, JJ., concur.

END OF DOCUMENT

Not Reported in N.E.2d
(Cite as: 1991 WL 184817 (Ohio App.))

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Ann M. RAGGAZINE, et al.,
Plaintiffs-Appellants,

v.

ST. ELIZABETH HOSPITAL MEDICAL CENTER,
Defendant-Appellee.
No. 90 C.A. 129.
Court of Appeals of Ohio, Mahoning County.
Sept. 19, 1991.

Civil Appeal from the Common Pleas Court, Case No. 89 CV 1903.

Ilan Wexler, Youngstown, for plaintiffs-appellants.

David C. Comstock, Youngstown, for defendant-appellee.

Before DONOFRIO, P.J., and COX and O'NEILL, JJ.

COX, Judge.

*1 This matter presents a timely appeal from a decision of the Mahoning County Common Pleas Court granting summary judgment in favor of the defendant-appellee, St. Elizabeth Hospital Medical Center.

On March 10, 1988, the plaintiff-appellant, Ann M. Raggazine was a patient at the appellee-hospital receiving medical care for reconstructive knee surgery. The

appellee-hospital's employees allegedly left the appellant on a bed pan for an extended period of time, resulting in injuries to her buttocks and lower back. On March 7, 1989, counsel for the appellant provided the appellee – hospital with a 180 day letter pursuant to R.C. 2305.11(B)(1) to extend the statute of limitations. The appellee-hospital received this letter on March 8, 1989.

On September 7, 1989, the appellants filed a complaint against the appellee – hospital for personal injuries in the Mahoning County Common Pleas Court. This filing occurred 183 days after receipt of the 180 day letter. The appellee – hospital filed an answer to the appellants' complaint on October 16, 1989. The appellee filed an amended answer on October 30, 1989. Thereafter, the appellee – hospital filed a motion for summary judgment and a memorandum in support with the trial court on November 28, 1989. The appellants responded with a memorandum in opposition on January 19, 1990. On June 13, 1990, the trial court conducted a hearing on the appellee's motion for summary judgment and granted said motion in a court order dated June 22, 1990. This appeal followed.

The appellants' sole assignment of error states:

"The Trial Court erred to the prejudice of Plaintiffs-Appellants by granting Defendant-Appellee's Motion for Summary Judgment when it concluded that Plaintiffs-Appellants' Complaint was barred by the statute of limitations."

Pursuant to R.C. 2305.10 relating to bodily injury the statute reads:

"An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

R.C. 2305.11(B)(1) states:

"Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given."

Additionally, R.C. 2305.11(D)(3), the legislature defines a "medical claim" as follows:

" 'Medical claim' means any claim that is asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person. 'Medical claim' includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person."

*2 The appellants herein contend that the question of whether or not a bed pan constitutes medical care is a factual issue which should be resolved by a jury as the trier of fact. As such, the appellants contend their complaint is not governed by R.C. 2305.11 since it does not

relate to medical care and should be governed by the two year statute of limitations contained in R.C. 2305.10.

In reviewing the changes made by the legislature of the statutes in question, it must be noted that when the legislature changed the statute in 1987 it brought within the scope of what was included as a "medical claim" actions against nurses arising out of the treatment of a patient. The broadening of the scope of a "medical claim" would certainly cover the fact situation which occurred herein, since the appellant was allegedly injured through the use of a bed pan, an instrument generally used in the health setting by a hospital employee. This situation clearly falls under the category of a "medical claim".

The trial court correctly made the proper distinction in concluding that the appellants' cause of action constituted a "medical claim" falling under the one year statute of limitations under R.C. 2305.11.

Therefore, the appellants' assignment of error is found to be without merit.

The judgment of the trial court is affirmed.

DONOFRIO, P.J., and O'NEILL, J., concur.

END OF DOCUMENT

No. 93-832

(3)

Supreme Court, U.S.
FILED
JAN 20 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ST. ELIZABETH MEDICAL CENTER,

Petitioner,

vs.

JIMMIE DEAN BROWNING, *et al.* and CONEY MITCHELL,

Respondents.

On Petition for Writ of Certiorari to the Ohio Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

JOHN G. LANCIONE
Counsel of Record
JOHN D. LIBER
PETER H. WEINBERGER
SPANGENBERG, SHIBLEY, TRACI,
LANCIONE & LIBER
Attorneys for Respondents
2400 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3400
(216) 696-3232

BEST AVAILABLE COPY

4711
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	3
I. Introduction	3
II. 28 U.S.C. § 1257 Prohibits This Court From Reviewing a Non-Final State Court Decision Which Involves Only Issues of State Law.	4
A. The Ohio Supreme Court's Interpretation of Revised Code § 2305.25, Rejecting Petitioner's Contention That the Statute Conferred Immunity for Respondent's Claims, Does Not Raise a Federal Issue, and Is Not Subject to Review by This Court.	7
B. Petitioner's Argument That Retroactive Application of the Ohio Court's Decision Deprives It of a Vested Right Without Due Process Is Contrary to Established Law.	10
C. Petitioner's Claim That the Ohio Supreme Court Was Other Than an Impartial Decisionmaker Is Without Support.	12
Conclusion	14

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1929) 6

Browning v. Burt, 67 Ohio St. 3d 1439 (1993) 2, 11

Chevron Oil v. Huson, 404 U.S. 97 (1971) 11

Cipollone v. Liggett Group, Inc., 822 F.2d 335 (3rd Cir. 1987) 12

Haines v. Liggett Group, Inc., 975 F.2d 81 (3rd Cir. 1991) 13

Harper v. Virginia Dept. of Taxation, 61 U.S.L.W. 4664 (1993) 11

James B. Beam Distilling Co. v. Georgia, 502 U.S. __, 115 L. Ed. 2d 481 (1991) 10, 11

Murdock v. City of Memphis, 87 U.S. 590 (1875) 5

Nickey v. Mississippi, 292 U.S. 393 (1933) 6

Ohio v. Gallagher, 425 U.S. 257 (1976) 1

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 5, 9

Val Decker Parking v. Corn Product, 411 F.2d 85 (6th Cir. 1969) 4

Contents

Page

Statutes Cited:

28 U.S.C. § 1257 ..... 4, 5, 9

42 U.S.C. § 11105(d) 7

42 U.S.C. § 11101 7

Ohio Revised Code:

2305.10 ..... 3, 5

2305.11 ..... 3, 5

2305.11(B)(1) 1

2305.25 ..... 3, 6, 7, 8, 9, 10

2305.251 ..... 6, 7, 8, 9, 10

United States Constitution Cited:

Fourteenth Amendment 9

Other Authority Cited:

Moore's Federal Practice, ¶ 505.01 5

APPENDIX

Appendix A — Brief of Appellant St. Elizabeth Medical Center in the Supreme Court of Ohio 1a

STATEMENT OF THE CASE

Respondents' civil lawsuits against Petitioner involve allegations that Petitioner, St. Elizabeth Medical Center (hereinafter "SEMC"), was negligent in granting and continuing staff privileges of certain incompetent physicians, and that as a proximate result of Petitioner's negligence Respondents were seriously and permanently injured by malpractice committed by those physicians. Respondents' claims are brought under the common law of Ohio, which provides that a hospital has an independent duty to exercise reasonable care to ensure that only competent physicians are granted and retain privileges within the hospital. Under Ohio law, a hospital is liable for injury caused by an incompetent physician who was negligently retained by the hospital.

Respondents' claims were dismissed by the trial court on summary judgment. The trial court held that, as a matter of law, the claims were barred by the statute of limitations set forth in Ohio Revised Code 2305.11(B)(1), which applies to "medical claims." The court of appeals reversed the decision of the trial court, and the Ohio Supreme Court affirmed. The Supreme Court set forth the following rules of law in the syllabus of its decision:[1]

> 1. Hospital negligence arising out of the "care" of a patient is a "medical claim" within the meaning of R.C. 2305.11(D)(3) and is subject to the period of limitations set forth in R.C. 2305.11(B)(1). "Care" as used in R.C. 2305.11(D)(3) is the prevention or alleviation of a physical or mental defect or illness.

---

1. This Court has recognized that "except for *per curium* opinions, it is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases." *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976).

> 2. Negligent credentialing of a physician by a hospital is not "medical diagnosis, care, or treatment" within the meaning of R.C. 2305.11.
>
> 3. An action against a hospital for bodily injury arising out of the negligent credentialing of a physician is subject to the two-year limitations period set forth in R.C. 2305.10.
>
> 4. The period of limitations set forth in R.C. 2305.10 commences to run when the victim knows or should have discovered that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.
>
> 5. R.C. 2305.25 does not provide a hospital with immunity from liability for the hospital's negligence in granting and/or continuing the staff privileges of an incompetent physician.

Browning v. Burt, 67 Ohio St. 3d 1439 (1993), syllabus.

As the syllabus clearly evinces, the Ohio Supreme Court's decision involves only issues of Ohio tort law. Nevertheless, Petitioner seeks to have this federal court review and ultimately reverse the Ohio Court. In short, St. Elizabeth Medical Center argues that the United States Constitution mandates that it be granted immunity for Respondent's claims, and that, as a matter of constitutional law, Respondents' claims are time barred. These arguments are without legal support, and do not warrant review by this Court.

REASONS FOR DENYING THE WRIT

I. Introduction

The Questions Presented for Review by Petitioner are utterly without foundation, and in fact border on the frivolous. For example, Question Number 1 asks whether "the Ohio Supreme Court's abolition of the immunity conferred by Ohio Revised Code § 2305.25 constitutes a denial of due process. . ." In point of fact, the Ohio Court did not abolish an immunity conferred by the statute, but rather, the Court interpreted the language of the statute and held that it did not confer immunity under the circumstances of this case.[2]

Question Number 2 is equally flawed. The Ohio Supreme Court did not, as Petitioner claims, deny hospitals the benefit of a statute of limitation. The Court merely clarified when a claim such as Respondents' would accrue for the purpose of the statute of limitations, and put to rest any question as to which Ohio statute of limitation applies thereto.[3]

---

2. Petitioner contends that the question of whether SEMC was immune from liability under Ohio law was "not raised by any party." Petitioner's Brief at 5. This contention is patently false. In point of fact, SEMC argued to the Ohio Supreme Court that Revised Code § 2305.25 provided SEMC with "immunity [which] constitutes another basis for upholding the trial court's dismissal of Plaintiff's claims against SEMC." Brief of Appellant SEMC at 34 n. 14. SEMC placed this issue squarely before the Court and should not be heard to complain that the Court considered, and rejected, SEMC's interpretation of the statute.

3. Petitioner states that, in briefing this issue to the Ohio Supreme Court, the parties stipulated that Ohio Revised Code § 2305.11, the "medical claims" statute of limitations, applied to this case. This statement is simply untrue. No such stipulation was entered into by the parties. Moreover, regardless of the arguments made to the lower Courts involving the applicable statute of limitation, the Ohio Supreme Court correctly applied Revised Code § 2305.10 to these actions. Petitioner's contention that the Court was bound to apply the (Cont'd)

Finally, Question Number 3 is nothing more than an attempt to forge a federal constitutional issue out of a decision involving only the interpretation of state law. Petitioner accuses the Ohio Supreme Court of bias solely because the Court used strong language in response to a disturbing, but undisputed, fact pattern. Petitioner, however, has failed to set forth any support for its contention that the Court's legal analysis was in any way influenced by those facts. Rather, the decision of the Ohio Court demonstrates that the Court conducted a detailed and careful analysis of Ohio law, and set forth its rulings on the legal issues independent of the facts.

The Ohio Court's decision does not present an issue which warrants review by this Court. Accordingly, SEMC's Petition for Writ of Certiorari should be denied.

II.

28 U.S.C. § 1257 PROHIBITS THIS COURT FROM REVIEWING A NON-FINAL STATE COURT DECISION WHICH INVOLVES ONLY ISSUES OF STATE LAW.

Petitioner maintains that this Court has been granted the authority to review the Ohio Supreme Court's decision by 28 U.S.C. § 1257, which confers upon the United States Supreme Court jurisdiction to review final judgments of state courts. As Professor Moore has explained, however, "the right to review provided by § 1257 is not unlimited. The prerequisites for review

---

(Cont'd)
wrong statute of limitations merely because neither party argued that the right one should apply is an inaccurate statement of the law. When a court is asked to determine the applicable statute of limitation, it should consider all of the statutes and apply the correct one, regardless of whether one party or the other so argued. *See, e.g. Val Decker Parking v. Corn Product,* 411 F.2d 85 (6th Cir. 1969).

under the section are designed to assure that the policy of achieving consistent decisions as to federal rights is fulfilled with the least possible federal intrusion into state judicial processes." Moore's Federal Practice, ¶ 505.01.

The prerequisites for review under §1257 are that there must be a final judgment or decree by the highest court of the state, and that the decision must bring into question a federal constitutional issue. Obviously, as these cases have not yet been tried, and no final decree has been entered, the prerequisites for review have not been fulfilled. *See, e.g. San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981) (dismissing appeal for lack of final judgment where state court had remanded action for new trial). The Ohio Court's decision is not a "final judgment or decree," but instead merely remands the action for trial on the merits. The decision, therefore, is not subject to review by this Court.

Moreover, the Ohio Supreme Court's decision involved only the interpretation and application of Ohio statutory and common law. Section 28 U.S.C. §1257 does not confer upon this Court jurisdiction to review questions involving state law. "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. City of Memphis,* 87 U.S. 590, 626 (1875).

In this case, the Ohio Supreme Court examined Respondents' causes of action against Petitioner, and concluded that they were not "medical claims" within the meaning of Ohio Revised Code § 2305.11, which provides a one year limitation period for all such claims. The Court held that instead the claims were governed by the two year limitation period set forth in Revised Code § 2305.10, which applies to actions for personal injury.

The Court also rejected Petitioner's claim that Ohio Revised Code §2305.25, the Ohio Peer Review Statute, confers immunity upon SEMC for Respondents' claims. The Court scrutinized the language of the statute, considered its purpose, and concluded that under the circumstances of this action, Petitioner did not fall within the class of persons to whom the statute conferred immunity.

That the decision of the Ohio Court, interpreting various state statutes, may not be scrutinized by this federal Court is well embodied in our dual system of jurisprudence. This Court must accept the "construction of the laws of the state by its highest court. . ." *Nickey v. Mississippi*, 292 U.S. 393, 396 (1933).

> . . . [T]he courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; . . . this Court's power to review decisions of state courts is limited to their decisions on federal questions; and . . . the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1929).

Nevertheless, Petitioner attempts to skirt this venerable principle of Supreme Court jurisprudence by fabricating several due process arguments out of the Ohio Supreme Court's interpretation and application of Ohio law. Petitioner claims that because Ohio Revised Code § 2305.251 renders privileged certain information which may or may not be germane to Petitioner's

defense, Petitioner's right to due process is violated and Petitioner is therefore entitled to immunity for those claims. Petitioner also argues that the Ohio Court's application of its decision to the parties before it constitutes a denial of due process. Finally, Petitioner accuses the Ohio Supreme Court of bias in violation of Petitioner's right to due process.[4] These contentions are unsupported by both law and fact, and do not provide a basis for review by this Court.

A. The Ohio Supreme Court's Interpretation of Revised Code § 2305.25, Rejecting Petitioner's Contention That the Statute Conferred Immunity for Respondent's Claims, Does Not Raise a Federal Issue, and Is Not Subject to Review by This Court.

Petitioner argues that Revised Code § 2305.251 could potentially deprive it of due process because the statute might prevent Petitioner from presenting certain information in its

---

4. Petitioner also contends that the Ohio Court's decision "undermine[s] important federal . . . policies intended to assure quality medical care to the public." Petitioner's Brief at 13. Even if this contention were true, it would not confer jurisdiction upon this Court to review the Ohio Court's decision on issues of Ohio law. Moreover, the Ohio Court's decision is supported by the very policy Petitioner claims is undermined. Petitioner contends that the policy behind the Health Care Quality Improvement Act of 1986, § 402, 42 U.S.C. § 11101, is undermined by the Ohio law. According to the Act, Congress found that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems. . . ." 42 U.S.C. § 11101. Moreover, the Act specifically provides that "[n]othing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician . . ." 42 U.S.C. § 11105(d). Clearly the primary policy behind the Act, the protection of patients from medical malpractice, is furthered, and not undermined, by the Ohio Court's decision.

defense at the trial of this action.[5] Accordingly, Petitioner claims that it is necessary for this Court to review the Ohio Supreme Court's interpretation of Revised Code § 2305.25 that the statute does not confer immunity to Petitioner for Respondents' claims. Essentially, Petitioner argues that because of the privilege created by Revised Code § 2305.251, the Constitution mandates that § 2305.25 be interpreted as conferring a corresponding immunity.

The Ohio Supreme Court considered, and rejected, Petitioner's argument. The Court found that the privilege conferred by Revised Code § 2305.251 does not prevent Petitioner from presenting evidence in defense of this action in light of the express language of the statute, which states that:

> . . . Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of a committee nor should any person testifying before a committee or who is a member of the committee be prevented from testifying as to matters within his testimony before the committee or opinion formed by him as a result of the committee hearing.

As the clear language of the statute demonstrates, and as the Ohio Supreme Court correctly noted, Petitioner's claim that its defense will somehow be hindered by the privilege created by Revised Code § 2305.251 is without merit.

---

5. Revised Code § 2305.251 provides that "[p]roceedings and records of all review committees described in section 2305.25 . . . shall not be subject to discovery or introduction in evidence. . . No person in attendance at a meeting of a review committee . . . shall be permitted or required to testify. . . as to any . . . matters produced or presented during the proceedings . . ."

Moreover, even if Petitioner's claim had some legal basis, the issue is not yet ripe for review by this Court. Petitioner's defense of this action has not been hindered, and until this action proceeds to trial, there can be no determination as to whether or not Revised Code § 2305.251 actually deprives Petitioner of the right to present an available defense. Petitioner is, in effect, requesting that this Court render an advisory opinion on the Constitutionality of Revised Code § 2305.251, in direct contravention of 28 U.S.C. § 1257, which authorizes this Court to review only final judgments or decrees by state courts. *See, San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), *supra*, at 5.

Finally, Petitioner's contention, that this Court should review and reverse the Ohio Court's interpretation of Revised Code § 2305.25 because § 2305.251 allegedly could violate Petitioner's right to present every available defense, is fundamentally flawed. Even if Revised Code § 2305.251 could somehow deprive Petitioner of due process by hindering its defense to this action, the appropriate remedy is not to re-write Revised Code § 2305.25 to provide for an immunity not conferred by the Ohio legislature, but rather to invalidate Revised Code § 2305.251 as being in conflict with the Fourteenth Amendment.

Significantly, Petitioner has not requested that this Court review the constitutionality of the privilege created by Revised Code § 2305.251. If this Court were to do so and agree with Petitioner that the statute violated Petitioner's right to due process, the statute would be nullified and SEMC would be permitted to present, in its defense, any information currently privileged under the statute. Accordingly, such a result would enable Petitioner to present the defenses which it claims are hindered by the statute. SEMC does not, however, seek the opportunity to present every available defense, although it is its right to do so which Petitioner alleges is violated by the statute. Rather, Petitioner seeks to avoid a hearing on the merits altogether, and argues that it is entitled to

immunity from Respondents' claims. Obviously, Petitioner's contention that Revised Code § 2305.251 could prevent it from presenting all available defenses is simply a thinly veiled attempt to fabricate a constitutional argument out of what is clearly an issue of state law. Ohio Courts have the supreme power to interpret Revised Code § 2305.25. The Ohio Supreme Court has done so, and has determined that it does not confer an immunity upon SEMC under the facts of this case. That decision is not subject to review by this Court.

B. Petitioner's Argument That Retroactive Application of the Ohio Court's Decision Deprives It of a Vested Right Without Due Process Is Contrary to Established Law.

Petitioner contends that the Ohio Court's holding should not be applied to the parties herein because to do so would be to deprive Petitioner of a vested right without the due process guaranteed by the United States Constitution. This contention lacks merit and, in fact, is in direct conflict with both established doctrine and recent pronouncements by this Court on this issue.

For example, this Court has recently explained that when a court decides to effect some change in the law, a question may arise as to whether or not the change should be applied retroactively, although "[i]n most decisions... retroactivity . . . goes without saying." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. —, 115 L. Ed.2d 481 at 490 (1991).

> [The practice of applying a change in the law to the parties before the court] is overwhelmingly the norm . . . and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law . . . It also reflects the declaratory theory of the law . . . according to

> which courts are understood only to find the law, not to make it.

Id. at 488 (citations omitted). Furthermore, as this Court has even more recently explained, "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J. dissenting)." *Harper v. Virginia Dept. of Taxation*, 61 U.S.L.W. 4664, 4666 (1993).

Nevertheless, Petitioner erroneously argues that *Chevron Oil v. Huson*, 404 U.S. 97 (1971) forbids retroactive application of the Ohio Supreme Court's decision. To the contrary, *Chevron Oil* merely permits "the denial of retroactive effect to a 'new principle of law' if such a limitation would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule." 61 U.S.L.W. at 4666.

In this action, the Ohio Court chose to give its decision both retroactive and prospective application.[6] That choice of law does not violate the Federal Constitution. Moreover, a denial of retroactive effect would have undoubtedly unduly undermined the purpose and effect of the rule set forth by the Ohio Court: to permit persons who suffered injuries as a result of a hospital's negligent credentialing practices to "have their day in court." 66 Ohio St. 3d at 565. Prospective only application of the rule would have caused Respondents and others similarly situated to risk the loss of their right to pursue their legal remedies before they could have even

---

6. It should be noted that the Ohio Court did not, as Petitioner claims, create a "new" rule of law. Rather, the Court merely applied the established "discovery rule" to the facts of this case. Prior to this action, the Ohio Supreme Court had not had the opportunity to determine when a negligent credentialing cause of action would accrue for the purpose of the statute of limitations.

known that they may have a cause of action. Thus, prospective only application would completely frustrate the purpose of the rule as set forth by the Ohio Court.

The Ohio Court was not constitutionally bound to apply *Chevron Oil, supra,* to determine whether or not to apply its ruling to the parties in this case. Moreover, even if the Court were so bound, *Chevron Oil* supports retroactive application under the circumstances. The Ohio Court's application of it decision does not raise a federal constitutional issue for review by this Court.

C. Petitioner's Claim That the Ohio Supreme Court Was Other Than an Impartial Decisionmaker Is Without Support.

It is a settled principle of law that "bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case. . ." *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 347 (3rd Cir. 1987) (citations omitted). Nevertheless, Petitioner accuses the Ohio Supreme Court of bias solely because the Court ruled adverse to Petitioner, and used strong language in response to an indisputably disturbing fact pattern.[7] Petitioner's contention is entirely without merit.

In its opinion, the Ohio Court set forth the facts, which Petitioner conceded were not in dispute, to facilitate its substantive analysis.[8] The Court then engaged in a lengthy and well reasoned

---

7. The language of which Petitioner complains is found only in the Court's conclusion. Petitioner does not take issue with the language used by the Court in its syllabus, statement of facts, or legal analysis.

8. Ironically, for the most part, the Supreme Court's statement of facts was taken directly from Petitioner's Appellate Brief to that Court. *See* Brief of Appellant, SEMC.

discussion of the applicable law, the history thereof, and the various policy considerations at issue. Finally, the Court explained that the trial court erred in holding that the Respondents' claims were time barred under Ohio law. There is no evidence whatsoever that the Court's legal analysis was in any way influenced by emotion or other improper motivation.

Furthermore, even if Petitioner could establish that the Ohio Supreme Court has been biased by its exposure to the evidence presented thereto, such a showing would not form the basis for a reversal of the Ohio Court's opinion. Rather, the appropriate remedy would simply be for the Ohio Court to be recused from further participation in this action. *See e.g. Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3rd Cir. 1991) (finding that ". . . the district court's explanation of the burden of proof was correct. The court's opinion reflects that it carefully analyzed the various views . . . and adopted a workable standard . . . ." but nevertheless assigning the case to another judge for further proceedings to preserve the appearance of impartiality).

Absent evidence that the Ohio Court's ruling was somehow effected by an improper motivation, Petitioner is not entitled to have the Court's well-reasoned decision set aside. Petitioner has not alleged such evidence exists, and cannot present such evidence. SEMC's mere allegation that it was denied an impartial decisionmaker does not suffice to create a federal issue for review by this Court. Accordingly, the Petitioner should be denied.

CONCLUSION

In accordance with the foregoing, Respondents respectfully request that this Honorable Court deny SEMC's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN G. LANCIONE
Counsel of Record
JOHN D. LIBER
PETER H. WEINBERGER
SPANGENBERG, SHIBLEY, TRACI,
LANCIONE & LIBER
Attorneys for Respondents
2400 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3400
(216) 696-3232

APPENDIX A — BRIEF OF APPELLANT ST. ELIZABETH MEDICAL CENTER IN THE SUPREME COURT OF OHIO

NO. 91-2079

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS SECOND JUDICIAL DISTRICT MONTGOMERY COUNTY, OHIO

JIMMIE DEAN BROWNING, et al.,

Plaintiff-Appellees,

vs.

JAMES C. BURT, M.D.,

Defendant,

MAX BLUE, M.D. and ST. ELIZABETH MEDICAL CENTER,

Defendant-Appellants.

APPELLANT, ST. ELIZABETH MEDICAL CENTER'S BRIEF

STATEMENT OF THE CASE

A. Background of the Litigation

This is one of forty-four (44) similar actions filed in Montgomery County. All of these cases involve claims of medical malpractice against Dr. James Burt and allegations that St. Elizabeth Medical Center ("SEMC") was negligent in allowing and continuing Dr. Burt's privileges. Before the court of appeals ruling here, a dozen of these cases, including plaintiff-appellees' action, were summarily adjudicated by several trial court judges as

barred by the statute of limitations. The first of these cases on appeal, *Hanks v. Burt,* was affirmed by the Montgomery County Court of Appeals; thereafter, this Court denied Plaintiffs' Motion to Certify. *Hanks v. Burt* (Jan. 25, 1991), Montgomery Ct. App. 12257, unpublished, Motion to Certify overruled (July 3, 1991), Sup. Ct. No. 91-625.

In the instant case, the court of appeals, by decision dated August 20, 1991, reversed the summary judgment for St. Elizabeth Medical Center ("SEMC") and also overruled its own opinion in *Hanks,* issued just seven months earlier. In so doing, the court of appeals adopted and applied a new test for the accrual of negligent credentialling actions against a hospital. This new test was not briefed or argued by any of the parties. Several days after the *Browning* decision, the same court again applied this new rule to reverse a summary judgment based on the statute of limitations in *Mitchell v. Burt* (Aug. 26, 1991), Montgomery Ct. App. No. 12224, Motion to Certify granted (January 22, 1992), Sup. Ct. No. 91-2121.

On September 5, 1991, two weeks after the Appellate Court's ruling in *Browning,* Common Pleas Judge Robert D. Nichols (sitting by designation in twenty-two of the cases) issued a decision granting summary judgment to SEMC in nineteen cases on the basis of the statute of limitations (and other grounds.[1] Judge Nichols noted that the *Browning* decision conflicts with *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131 and other rulings of this Court. After analyzing this Court's rulings on the discovery rule in malpractice cases, Judge Nichols observed:

---

1. On September 9, 1991, Judge Nichols issued an identical opinion dismissing the remaining three cases before him.

Appendix A

> The Court of Appeals stated that "A 'cognizable event' occurs when a patient discovers or should have discovered both the injury and the negligence." *Browning v. Burt, supra,* 12. To require discovery of both injury and negligence ignores the debate that has raged in the Supreme Court since 1983 and the resolution of that debate in favor of discovery or an injury.
>
> * * *
>
> It is obvious that Moyer, Holmes and Wright [by their concurring opinions in *Allenius*] did not want any misinterpretation of Douglas' position by which trial courts might reintroduce recognition of malpractice as the standard by which to determine a cognizable event. However, that is precisely what the court of appeals did in *Browning* when it stated that the cognizable event occurs upon discovery of both injury and negligence.

Roberts v. Burt (Sept. 5, 1991), Montgomery C.P. No. 87-636, etc. at p. 26, 33.[2]

---

2. In addition to those cases already discussed, ten cases are still in common pleas court awaiting rulings on SEMC's motions for summary judgment (based primarily on the statute of limitations). Yet another case, *Phillips v. Burt* (June 21, 1991), Montgomery C.P. No. 868-1004, was recently tried to jury. After a lengthy, seven-week trial on all issues, the jury returned a verdict for SEMC on the statute of limitations. That case is currently pending in the trial court on post-trial motions filed by the plaintiff.

Appendix A

As Judge Nichols observed, the court of appeals' decision conflicts with the prior rulings of this Court. The trial courts of the Second District must now choose whether to apply this Court's precedents or those of the court of appeals. Further, as discussed below, application of the new test which this case establishes threatens to have a negative impact upon hospitals in this state.

B. Procedural Posture

Plaintiffs' Complaint was filed on April 17, 1989. (Rec. at 10). Plaintiff, Ms. Browning, alleged that Defendants Dr. James Burt and Dr. Max Blue, former members of SEMC's medical staff, performed experimental and unnecessary surgery on her without her consent. Although set forth in a single count, she asserted two separate claims against Defendant, SEMC, one for negligence in credentialling Dr. Blue and the other for negligently credentialling Dr. Burt. (Rec. at 13). Plaintiff, Mr. Browning, asserted a derivative claim against all defendants for "the loss of the society, companionship, consortium, and services" of his spouse. (Rec. at 14). SEMC and Dr. Blue filed timely Answers in which they asserted, *interalia*, the defense of the statute of limitations. (Rec. at 19, 26). Plaintiffs' motion for default judgment against Dr. Burt was granted on July 21, 1989, but such order did not determine a specific monetary recovery against Dr. Burt.

Mrs. Browning was deposed on July 19, 1989. (Rec. at 43). Subsequently, SEMC and Dr. Blue filed motions for summary judgment based on the statute of limitations. (Rec. at 30, 186). The trial court granted these motions on December 5, 1989 and February 2, 1990, respectively. (Rec. at 327, 352). Judgment entries were filed as to SEMC on January 3, 1990 and as to Dr. Blue on March 5, 1990. (Rec. at 340, 358). After a Civil Rule 54(B) certification, Plaintiffs appealed. (Rec. at 361).

Appendix A

In a decision issued August 20, 1991, the court of appeals reversed, in its entirety, the ruling of the trial court as to SEMC. (Rec. at 456). The Court of Appeals affirmed the dismissal of Ms. Browning's claims against Dr. Blue, but reinstated Mr. Browning's derivative claims.

On October 17, 1991, SEMC filed its Notice of Appeal to this Court in the court of appeals. (Rec. at 473). Dr. Blue also appealed to this Court the ruling reviving Mr. Browning's consortium claim against him. (Rec. at 472). Plaintiff did not appeal the ruling upholding the dismissal of Ms. Browning's malpractice claim against Dr. Blue and that aspect of the case is therefore final.

On January 15, 1992, this Court granted Appellants' Motion to Certify. One week later, on January 22, 1992, a similar ruling was issued in *Mitchell v. Burt,* Sup. Ct. No. 91-2121. The Court, *sua sponte,* ordered the *Browning* and *Mitchell* appeals consolidated.

II. STATEMENT OF THE FACTS

Jimmie Dean Browning underwent a number of surgeries by Dr. Blue and Burt at SEMC from 1982 to 1986. Accepting Ms. Browning's account, none of the ills or dysfunctions which the surgeries were calculated to help were cured or even improved. The old problems were aggravated, new problems appeared, and all become chronic. On February 19, 1982, Drs. Burt and Blue performed the first surgery which consisted of an exploratory laparotomy, vaginal reconstruction, circumcision of her clitoris and insertion of a urinary catheter. The vaginal reconstruction consisted of the redirection and elongation of her vagina, as well as repair of the front and back vaginal walls. According to Ms. Browning, Dr. Burt had informed her prior to her surgery that it would include measures to enhance sexual response:

> A. Well, Dr. Burt told me that they would be able to place — build a pedestal in there to put my bladder on, him and Dr. Blue to where I would be able to void better and that he might do a few cosmetics things in there to enhance my sex life.

(Rec. at 92). She also stated that Dr. Burt told her "he was going to try and fix things so that I wouldn't have trouble during intercourse." (Rec. at 128, 157).[3] Prior to that surgery, Plaintiffs

---

3. Two weeks before the 1982 vaginal reconstruction surgery Ms. Browning had been advised in writing that the Executive Committe of the Medical Staff at SEMC knew about the surgery which she was about to undergo. Exhibit A to her deposition was a letter on SEMC letterhead as follows:

> Dear Patient:
>
> The Executive Committee of the Medical Staff of St. Elizabeth Medical Center wishes to inform you that the "female coital area reconstruction" surgery you are about to undergo is:
>
> 1. Not documented by ordinary standards of scientific reporting and publication.
>
> 2. Not a generally accepted procedure.
>
> 3. As yet not duplicated by other investigators.
>
> 4. Detailed only in non-scientific literature.
>
> You should be informed that the Executive Committee of the Medical Staff considers the aforementioned procedure an unproven, non-standard practice of gynecology.

(Cont'd)

Appendix A

only medical problems were bladder problems and painful sexual intercourse. (Rec. at 88, 93, 157). Ms. Browning testified that she developed a myriad of unusual and exacerbated symptoms following her surgery on February 19, 1982. She experienced worsened bladder problems (including problems with incontinence and obstruction of urine flow) and worsened sexual problems, as well as newly-developed kidney problems (including severe infections and bleeding), vaginal pain, and bowel problems. (Rec. at 89-91, 96-99, 118, 130-134). She also had to employ an indwelling urinary catheter for six months following her surgery. (Rec. at 130). After the catheter was removed, Ms. Browning became aware of these numerous problems. As she stated "when he took the catheter out [in 1982] and I couldn't go is when I became aware of I had problems then." (Rec. at 99). At that time she realized that she "should have been able to go on my own without any problems but I wasn't," and that she "wasn't able to void like I should." (Rec. at 130-131). She recognized that this problem with voiding was different from her urinary problems with voiding

---

(Cont'd)

/s/ Jimmie Dean Browning
Patient's Signature
/s/ Vivian A. Helbling
Witness

2-5-82
Date

The original of this letter, which bears Ms. Browning's witnessed signature, is a part of her hospital record from the February, 1982 surgery. It bears an addressograph print of her name and Dr. Burt's in the upper right, just as the other pages of the hospital record. Thus, examination of her hospital record at any time since 1982 would have reminded Plaintiff or her counsel of the facts stated in the letter. One of her claims later pled against SEMC, was that it had negligently and knowingly permitted Burt to perform experimental surgery on her. Complaint Paragraph 15(b).

before the 1982 surgery. (Rec. at 131-132). The incontinence she began suffering immediately after the removal of the catheter was a problem she had never experienced in her adult life. (Rec. at 131-132). She also began experiencing new and distinct sexual problems which, according to Ms. Browning, Dr. Burt told her she should not be having. (Rec. at 133). These problems became evident several weeks after her surgery when Plaintiffs attempted to have sex but could not because Ms. Browning "wasn't healed up in there like I should have been." (Rec. at 133). She knew that her sexual relationship with her husband "wasn't normal" after the 1982 surgery because her "husband had trouble penetrating. It seemed like it was too small in there. It caused me an awful lot of pain." (Rec. at 134). These sexual problems have not "healed up," but have drastically reduced Plaintiffs' sexual activity, as evidenced by the fact that, during one of the years following her surgery, they had sex only twice. (Rec. at 99).

Ms. Browning stopped seeing Dr. Burt in 1983. (Rec. at 86, 115). She discontinued her treatment with him because "he wasn't doing me any good." (Rec. at 135).

Ms. Browning subsequently underwent a number of additional surgeries performed by Dr. Blue. The final surgery, on August 23, 1986, involved removal of one of her kidneys. (Rec. at 55). She has not been treated by Dr. Blue since August of 1987, and has not been hospitalized at SEMC since September of that year. (Rec. at 69, 81, 113).

According to Ms. Browning, the subsequent surgical treatments by Dr. Blue did not improve either her problems which developed following her February 1982 surgery or her pre-existing bladder problems. In fact, she stated that her problems worsened following her surgical treatment by Dr. Blue in 1986, and that she

developed right flank pain and "an awful lot of swelling" in her back after her 1986 surgery. (Rec. at 57, 64-65, 67, 89, 99).

Ms. Browning began to investigate her concern as to Dr. Blue's treatment of her when, in June of 1987, she went to the Cleveland Clinic. According to Ms. Browning:

> I went up there about my kidney, you know, to make sure — you know, why I was having all the trouble after my kidney was removed is why I went . . . .

(Rec. at 60). She went so far as to tell that physician that she "thought something was wrong, you know, from the surgery I'd had, that I didn't get over it and when he took my kidney out, I thought I wouldn't have any more problems." (Rec. at 62-63, 71, 103). According to Ms. Browning, the Cleveland Clinic physician told Dr. Blue and wrote in a letter that there had been a "flaw" in her surgery, but she never investigated the specific nature of that "flaw." (Rec. at 62, 105).

Just after that 1987 visit to the Cleveland Clinic, Ms. Browning confronted Dr. Blue as to her belief "that he had done a *malpractice operation* on [her] because [she] was not getting well." (Rec. at 59). (emphasis added). During her encounter with Dr. Blue, she "asked him why I had been through all the surgeries and been in the hospital so many times if there wasn't nothing wrong with me and every time he told me I was going to be just fine that time." (Rec. at 83).

Ms. Browning also complained to Dr. Blue at the time (1987) about Dr. Burt because "I became incontinent after I had that [1982] surgery done." (Rec. at 85). Ms. Browning also told Dr.

Blue at that time Dr. Burt had allegedly told her earlier in 1982 or 1983 that "half of the surgeries that I had had done on me were malpractice." (Rec. at 85, 86).

Ms. Browning again accused Dr. Blue of having committed malpractice on her, asserting that he was a "liar," in August of 1987. (Rec. at 77-78). Ms. Browning also told her psychiatrist in 1987 that she hated Dr. Blue because she "felt like he had ruined my life" because "after my kidney was removed, I still wasn't well and I'll never be well.' (Rec. at 106). She had continued, since August of 1987, to think that Dr. Blue committed malpractice on her:

> Q. Did you have any other occasions to tell Dr. Blue that he was either a liar or that he committed malpractice on you after August of 1987?
>
> A. Well, *I though that ever since.*
>
> Q. I understand that you've thought that ever since and by that, you're talking about that he committed malpractice on you?
>
> A. Yes sir.

(Rec. at 78). (emphasis added).

By Decision and Order entered December 5, 1989, the trial court dismissed Plaintiffs' claims against SEMC as barred by the statute of limitations. (Appendix at 21a). Noting that "Plaintiff's deposition . . . is replete with indications that Plaintiff knew something was wrong," the trial court found that Plaintiffs' claims

accrued, at the latest, in August, 1987. (Appendix at 23a, 25a). Plaintiffs' action, which was brought a year and eight months thereafter, was accordingly deemed untimely under R.C. § 2305.11. (Appendix 25a, 26a). On February 2, 1990, the trial court issued a similar ruling dismissing Plaintiffs' claims against Dr. Blue. (Appendix at 27a).

The court of appeals, on August 20, 1991, affirmed the summary judgment dismissing Ms. Browning's claims against Dr. Blue, but reversed the trial court's grant of summary judgment in favor of SEMC.[4] The court found that, under *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, Ms. Browning's claim against Dr. Blue occured in 1987. (Appendix at 14a). Since Plaintiffs did not file suit until April of 1989, the court agreed that Ms. Browning's action against Dr. Blue was barred by the malpractice statute of limitations, R.C. § 2305.11 (B)(1). (Appendix at 14a-15a).

Despite the foregoing finding, the court of appeals ruled that Ms. Browning's action against SEMC was not barred by the statute of limitations. To achieve this result, the court of appeals revived an old and disapproved "cognizable event" analysis against SEMC:

> A "cognizable event" occurs when a patient discovers or should have discovered both the injury and the negligence. *Allenius, supra.*
>
> The critical inquiry is *when* should the appellant have had reason to believe that St. Elizabeth Hospital had failed to provide

4. The court also reinstated Mr. Browning's derivative claims against Dr. Blue.

> adequate supervision or review of Drs. Burt and Blue? There is no evidence before the Court that the appellant knew or should have known that the hospital had failed to perform its legal duty toward her until she saw the West 57th Street television show in late 1988. Appellant filed her lawsuit against the hospital within six months of viewing that program. The trial court improperly granted summary judgment in favor of the hospital.

(Appendix at 16a-17a).

This position adopted by the Court of Appeals was *never* briefed, argued, discussed or even alluded to by any of the parties. To the contrary, the parties implicitly agreed that an event triggering the statute of limitations as to the Defendant physicians would also begin the statute running as to SEMC. The only dispute between the parties was over just what Plaintiffs had to "discover" — the malpractice of the physicians (as Plaintiffs maintained) or Ms. Browning's injuries (as Defendants argued).

The court of appeals' ruling here conflicts with this Court's decisions in *Richards v. St. Thomas Hospital* (1986), 24 Ohio St. 3d 27, *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1, and *Allenius, supra,* and would revive the debate lately settled by this Court whether discovery of the malpractice (or negligence) is required. Moreover, the test adopted by the court of appeals would effectively eliminate the statute of limitations for hospitals sued on claims of negligent credentialling. It rewards plaintiffs who exercise little or no diligence in investigating their potential claims and promises to burden hospitals with litigations decades after the treatment complained of and long after the primary claims against

the physicians have expired.[5] The precedents of this Court, as well as public policy considerations mandate reversal.

III. ARGUMENT

Proposition of Law No. 1:

For a Medical Claim Of Hospital Negligence To Accrue For The Purpose Of The Statute Of Limitations, It Need Not Be That The Patient Knows Or Should Know That The Hospital Has Been Negligent. It Is Enough That Events Cognizable To The Patient Do Or Should Alert The Patient Of The Need To Investigate A Potential Claim For A Medical Condition Which The Patient Does Or Should Relate To Care Received At The Hospital.

A. The New "Discovery Rule" Adopted by the Court of Appeals is in Direct Conflict With The Previous Decisions of This Court

In resurrecting Plaintiffs' claims against SEMC, the court of appeals neglected both the letter and spirit of this court's pronouncements on the discovery rule in medical cases. In addition to requiring discovery of the injury, the court of appeals held that a cause of action for malpractice against a hospital does not accrue until the patient is (or should be) aware of (1) the legal duty owed to her by the hospital as regards credentialling of physicians; and (2)

---

5. This litigation is illustrative of this point. Of the forty-four cases pending, twenty-nine involve suits brought ten years or more after Plaintiff's surgical or medical treatment by Dr. Burt. Seven suits date back nearly twenty years.

the hospital's breach of that duty. (Appendix at 16a-17a). This test goes far beyond the discovery rule established by this Court in *Oliver v. Kaiser Community Health Foundation* (1983), 5 Ohio St. 3d 111 and is progeny and adopts a standard explicitly rejected by this Court just two years ago

In *Oliver* this Court held that, "Under R.C. § 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." *Id.* at 111. The question subsequently arose whether discovery of the negligence (malpractice) had to occur for such a claim to accrue. This Court has repeatedly and resoundingly answered this question in the negative.

In *Richards v. St. Thomas Hospital* (1986), 24 Ohio St. 3d 27, plaintiff underwent surgery in 1975 for a herniated disc and thereafter never regained movement in his legs. He never asked a doctor about the treatment he received at St. Thomas Hospital, nor did he seek legal advice until after November of 1982. He commenced an action for medical malpractice on October 7,1983. This Court ruled that plaintiff's action accrued upon discovery of the injury and was barred by the statute of limitations:

> In *Oliver*, we observed that one purpose of the "discovery rule" was to afford "relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable" . . . Thus, *Oliver* does not rely exclusively on the patient's actual discovery of the malpractice alleged; rather, the cause of action accrues when the physical injury complained of is or should have been discovered by the patient.

Chief Justice Celebreeze dissented, arguing that a cause of action should not accrue until Richards discovered both the injury and the hospital's responsibility for it. Id. at 31-32. Shortly thereafter, the Court, in *Hoffman v. Davidson* (1987), 31 Ohio St. 3d 60, followed the *Richards* rationale, finding that the statute of limitations began to run when the plaintiff discovered her physical injury.

The Court revisited and thoroughly analyzed this issue in *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1. In *Hershberger*, the Court reviewed four methods used in other jurisdictions to define accrual of malpractice claims and specifically adopted the third approach as used in *Graham v. Hanson* (1982), 128 Cal. App. 3d 965, and in *McGee v. Weinberg* (1979), 97 Cal. App. 3d 791, 804. In this process, the *Hershberger* Court specifically rejected the method using discovery by the patient of a "legal injury" or of malpractice for defining accrual. The Court noted significant problems with such a test:

> [T]o utilize "legal injury" might effectuate a complete undermining of the discovery rule since anyone could allege ignorance of his legal rights. It would also be most difficult to refute such an allegation, whether or not true, without proceeding to full trial. An issue of fact could be compounded unless objective proof, which would ordinarily not be available, could sufficiently infer such subjective knowledge or belief. It is therefore knowledge, actual or inferable, of *facts*, not legal theories which initiates the running of the one-year statute of limitations.

Id. at 4-5

Appendix A

The entire point of this Court's opinion in *Hershberger* was to resolve the uncertainty created in *Oliver* and Supreme Court cases subsequent thereto, which alternatively discussed the plaintiff's discovery of "injury," "physical injury complained of," "resulting injury" or "malpractice," as if these terms were synonymous. 34 Ohio St. 3d at 3, 4. *Hershberger* makes clear that such terms are not interchangeable and that discovery of "legal injury" is not required before the statute of limitations begins to run.

In *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, the Court again reaffirmed that accrual does not require discovery of the negligence/malpractice. The *Allenius* Court refined the test announced in *Hershberger* and laid down what is now the law for accrual of a medical malpractice claim:

> [A cause of action accrues when there is] an occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Id. at 133. The Court rejected the *Allenius* plaintiff's position that the statute was triggered only when she was informed of the malpractice. *Id.* at 132, 134. The decision of the Franklin County Court of Appeals which this Court reviewed in *Allenius* found that the period of limitation "began to run when '* * * the plaintiff is aware or should be aware of the event which caused the injury and aware of the nature of the injury as a legal wrong. * * *' " 42 Ohio St. 3d at 132. The decision of the court of appeals in this case is

substantially identical to that of the court of appeals in Allenius.[6]

Concurring opinions were authored in *Allenius* by the Chief Justice and Justice Holmes in order to emphasize the intent and significance of the "cognizable event" test the Court was adopting:

> [I]n determining when the statute of limitations is triggered, " '[t]he test is whether the Plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.' . . ." As indicated by the majority, it is a cognizable event such as the occurence of pain or injury "* * **rather than knowledge of its legal significance* that starts the running of the statute of limitations." (Moyer C.J.)
>
> [A] cognizable event involves pain or some other physical indicium, rather than knowledge of the legal significance of such pain . . . . (Holmes, J.).

Id. at 135 (emphasis added, citations omitted).

Every tort lawsuit has its genesis with the future plaintiff reflecting on whatever misfortune has befallen him or her and asking a few standard questions: "Was this harm that happened to me avoidable? Is it someone's fault that it happened? Whose fault is it?" The problem in determining accrual dates for the medical

---

6. The court of appeals in *Allenius* rendered its decision before this court's December, 1987, ruling in *Hershberger*.

claim statute of limitation has always been to say just how grave, surprising, incongruous and suggestive of fault, an untoward medical outcome must be before the "reasonable person" would presumably be moved to inquire into his or her rights. The kinds of circumstances which could meet this threshold of suspicion can be described, but not defined, because the potential variations are unlimited. The important distinction is that it is such circumstances which would prompt a reasonable person *to inquire* into his rights, *not* circumstance which would compel a given conclusion to that inquiry, which will set off the statute of limitation.

There are some situations in which all would agree that the circumstances would compel a reasonable person to ask the "fault questions" which spawn every tort action. The simplest and perhaps most concise characterization of these limitation-triggering circumstances was quoted in *Hershberger*: "* * *[F]acts and events which inform a person that something is wrong, or *should be looked into* . . ." 34 Ohio St. 3d at 5 (emphasis added), quoting *McGee v. Weinberg* (1979), 97 Cal. App. 3d 798, 804, 155 Cal. Rptr. 86, 90. If an airplane has crashed into a house or a person has been struck by a car while walking on a city sidewalk, no one would debate that my statutory period to sue for damages for that harm begins to run at the time of injury. Someone may be liable — or no one — but the circumstances of the injury compel the person to investigate, reach conclusions on fault and liability, and sue, if he or she chooses to, all within the period of limitation. There are also situations at the other end of the continuum, in which all would agree that no reasonable person would consider that he or she might have a grievance against another. If a surgical sponge is left behind in the incision and this situation produces no symptoms or signs for many years, no such patient could or would investigate his or her legal rights agains the surgeon during that interval. This scenario, which itself was the factual setting for the formulation of

the "discovery rule," bears no similarity to this case, in which an operation designed to solve a problem, made it much worse and precipitated new problems.

Nothing in the court of appeals' decision would logically limit its application to medical claims or claims against hospitals. If a plaintiff's inaction and passive ignorance of the details of a defendant's specific negligence tolls the statute of limitations for medical claims, why not for all other negligence claims? The variety of situations in which investigation is necessary before a would-be plaintiff can discover all potential defendants and all theories of liability is broad indeed.

Often one who knows (or should suspect) that he or she has an actionable claim must investigate the facts and/or law to identify his potential defendants and/or theories of recovery. This investigation may be as simple as exchanging names and addresses with the other driver at the scene of an automobile accident. It may, less often, require assessment of technical data and consultation with experts. Whichever the situation, it has never, until now, been Ohio's law that dilatory plaintiff was priviliged to forego investigation of his own rights, though possessed of good cause to suspect that his injuiry was someone's fault, and to wait for his lawyer and his case to find him. Neither has a defendant been obliged to make a case for his own negligence and then prove that the plaintiff should have sooner seen that negligence, even without investigation or initiative, before that defendant could benefit from a statute of limitations. The court of appeals' ruling, however, embodies both these propositions.

Ms. Browning was clearly aware of her injuries and the need to investigate her possible remedies well more than a year before she filed suit. The court of appeals, in fact, so found and thereby

affirmed the dismissal of Ms. Browning's claim against Dr. Blue. This ruling should have also disposed of Ms. Browning's claim against SEMC. (After all, she knew from the start that her surgeries were performed at SEMC.) Instead, the court of appeals applied a far different, much more extreme discovery rule against SEMC (while presuming to utilize the same statute of limitations and case law interpreting it). That new test (requiring awareness of both the legal duty owed to the patient and of the negligence committed before accrual occurs) conflicts with this Court's holding in *Richards*, *Hoffman*, *Hershberger* and *Allenius*. Accordingly, the court of appeals' ruling below must be reversed and the trial court's decision reinstated.

B. A Plaintiff Has A Duty To Investigate All Potential Claims And May Not Sit Idly By Until Coincidence Brings A Cause Of Action To Her Attention

The court of appeals' decision below eliminates any requirement for a plaintiff to investigate possible remedies — even though she knows of her injuries and does or should suspect that they were caused by the negligence of another. That ruling is contract to Ohio law and public policy.

The court of appeals conceded that Ms. Browning knew of her injuries, connected them to her medical treatment, and believed they were due to medical negligence in August of 1987, if not earlier. (Appendix at 14a). Despite this awareness, Ms. Browning did not pursue her possible remedies against her physicians, SEMC, or other health care providers until April 17, 1989, when she filed this action. On the basis of these facts, the court properly found that Ms. Browning's claims against her treating physician, Dr. Blue, were barred by the statute of limitations. However, the court, rewarded Ms. Browning for her lack of diligence, holding that her claim against SEMC for the same injuries was not barred.

That claim was deemed to have accrued, if at all, in October of 1988, when Ms. Browning, by coincidence, saw a television program about Dr. Burt. (Appendix at 17a). In so ruling, the court discounted the plaintiffs' duty to investigate potential claims and created a standard that may have far-reaching, grossly inappropriate results.

This Court's decision in *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131 suggests that a claim against a hospital for negligently credentialling a physician must accrue (at the latest) at the same time as the malpractice action against that physician — specifically because of plaintiffs' duty to investigate potential claims. In *Allenius*, this Court established the test for determining when a malpractice claim accrues for purposes of the statute of limitations set forth in R.C. § 2305.11, holding that there must be:

> [A]n occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Id. at 133. The foregoing is instructive. It emphasizes the need to pursue *possible* remedies and does not restrict the patient's responsibility to pursuing only claims against the physician. Rather, *Allenius* clearly envisions and requires that the patient investigate and pursue all possible remedies once she has been put on notice by the cognizable event. Among these *possible* remedies are claims against the physician or physicians for malpractice, claims against the nurses for improper care, claims against the

hospital for the actions or omissions of its employees involved in the patient's care, *and* claims against the hospital for negligence in the credentialling and retention of the staff physician treating the patient.

Courts in analogous situations have concluded that accrual of an action against one or more defendants also begins the statute of limitations running as to all potential defendants who are or should be discovered. In *Bales v. University of Cincinnati* (July 25, 1991), Ky. Ct. App. Nos. 90CA-1751-MR and 90CA-1822-MR, (Appendix at 103a) plaintiff underwent bladder repair surgery at Humana Hospital — Lake Cumberland, Kentucky. During the surgery her left ureter was inadvertently severed and several days later she was transported by helicopter to the University of Cincinnati Hospital ("U.C. Hospital"). The treatment rendered en route apparently led to a gangrenous condition, causing her to lose portions of her fingers, feet and toes. Within a year (the period of limitations in Kentucky for a negligence or malpractice claim against a physician or hospital), she brought suit against Humana Hospital and her Kentucky physicians. She did not sue U.C. Hospital at that time. Six months later, plaintiffs counsel deposed one of the Kentucky physicians, Dr. Kennedy. Dr. Kennedy placed blame for the plaintiff's injuries upon the treatment of the U.C. Hospital Air Care Unit. On the basis of that testimony, plaintiff filed a new suit on November 29, 1989, naming as defendants the Kentucky health care providers and U.C. Hospital. U.C. Hospital moved for summary judgment, asserting that plaintiff's action was barred by the Kentucky one-year statute of limitations. The trial court granted the motion and plaintiff appealed. The court of appeals affirmed the dismissal of plaintiff's claims against U.C. Hospital, emphasizing that it was plaintiff's obligation to investigate her claims against all potential defendants and bring suit against any of them she wished to within the statutory one-year period:

> Mrs. Bales contends that there existed a genuine issue of material fact as to when she discovered or reasonably should have discovered that she had been injured by U.C., precluding summary judgment .... We disagree....
>
> [T]his is not a case where Mrs. Bales has no way of determining who the negligent parties are, nor is it a latent disease case in which the symptoms do not manifest themselves until long after the exposure or injury. Mrs. Bales complains of injury during the bladder repair surgery itself and the subsequent injury to her extremities from lack of circulation. This subsequent injury became apparent in January, 1988 and Mrs. Bales knew at that time that her injuries, of whatever nature, were caused by the Kentucky defendants or U.C. or a combination thereof. *She had the opportunity and responsibility to have the medical records evaluated so that proper parties could be sued, or she risked being forever barred from making a claim against unnamed persons or entities. We agree with the trial court that the law allowed her one year from early January, 1988 "to determine which of the potential defendants to sue."*

Slip op. at pp. 4-6 (emphasis added and citations omitted).

In *Urchel v. Holy Cross Hospital* (1980), 82 Ill. App. 3d 1050, 403 N.E.2d 545, plaintiff sustained a fractured neck in 1973 in a

vehicular collision. He was taken to the emergency room at Holy Cross Hospital. Upon his discharge, he was a quadriplegic. A 1973 action against the transit association was settled in 1976. In 1977, the plaintiff sued the hospital where he was treated, claiming failure to timely diagnose and treat his condition and aggravation of his initial injuries. Plaintiff further alleged that he first learned of defendant-hospital's alleged liability in 1976 when he heard deposition testimony about the same bus accident. That witness had testified that she saw the plaintiff sitting up in the hospital emergency room. The defendant-hospital asserted the statute of limitations as a defense and the court granted the defendant's motion to dismiss. In affirming, the court of appeals wrote:

> Beginning with the time the plaintiff was injured and became aware of the possibility that someone was at fault, he was subject to constructive knowledge of the normal two year statute of limitations within which a suit for medical malpractice must be brought. During this period of time the plaintiff should have thoroughly investigated the circumstances of the accident and events occurring subsequent thereto to determine not only the facts necessary to his suit against the [transit association] but, in addition, to determine whether any other parties might have been at fault. The plaintiff had an opportunity to know he had a cause of action.

Id. at 547. *In accord, Lebrecht v. Tuli* (1985), 130 Ill App. 3d 457, 473 N.E. 2d 1322, 1344. (Where in rejecting the contention that discovery occurred at different times in a malpractice action against a physician, hospital and clinic, the court stated: "[O]nce

Plaintiff is on notice as to one Defendant's negligence, she has a duty to inquire about other potentially negligent parties.",

The importance of plaintiffs' duty to investigate was also emphasized in *Kroes v. Harryman* (1958), 352 Mich. 642, 90 N.W. 2d 444. In *Kroes*, the plaintiff was burned when a bottle exploded near her at the doctor's office where she worked. Plaintiff timely commenced suit against the doctor, but did not file an action against the pharmacy which supplied the bottle until the statute of limitations had run. Plaintiff attempted to avoid the foreclosure of her action by arguing that the defendant-doctor concealed the identity of anyone else who might have been made a party and that she had "just recently" learned that the defendant-pharmacy supplied the liquid. The Court rejected this argument, stating:

> [N]o inquiry or investigation was made by the plaintiffs or their attorney as to the possible liability in this case of any other person than the defendant (doctor). No questions were asked of [the doctor], and it is obvious that had the question been asked it would have been answered. . .
>
> The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence, to have discovered. It does not seem to me that litigants should be permitted to allow the statute to expire, make no attempt whatever to determine who might or might not be liable, and then have

> the statute extended by merely claiming that someone concealed the identity of a party or a cause of action when it is obvious that they made no effort whatever to find out for themselves.

Id. at 447.

A lower court of this state has also pointed out the importance of requiring a plaintiff to investigate all of her potential claims. In *Hervey v. Normandy Development Co.* (March 16, 1990), Ashtabula Ct. App. No. 89-A-1433 (Appendix at 43a), unreported, mot. to cert. overruled (1990), 52 Ohio St. 3d 708, plaintiff sued a mobile home manufacturer over injuries she sustained from fromaldehyde emissions within the home. She discovered her injuries and the possible connection with formaldehyde emissions in August of 1982. Although plaintiff filed her action in January of 1983, she did not attempt to bring the supplier of the mobile home's flooring (a source of the formaldehyde) into the action until February of 1986. In opposition to a motion for summary judgment on behalf of the flooring supplier, plaintiff argued that the statute of limitations did not begin to run until she had discovered the identity of the defendant. The trial court granted summary judgment. In affirming that ruling, the court of appeals stated:

> "... Under the 'discovery rule' in Ohio, an injured party has two years from discovering the injury to file a claim against the party liable. *That two-year period is provided so that the injured party has ample time to identify responsible parties and to evaluate his legal claim.* Prejudice to the defendants would be enormous if claims could be filed against them

> five or ten years after an incident occurred. Evidence would be lost and memories clouded, not to mention the disastrous effect on the liability insurance system. In short, if the legislature had intended to allow the delaying of filing a claim until all liable parties could be identified, they would have included such a provision in the statute."
>
> * * *
>
> Under the facts of this case, the policy reasons which underlie statutes of limitations would be frustrated by appellant's argument. Within the framework of the facts herein, appellant cannot simply disclaim knowledge of appellee Champion's identity and let the statute of limitations languish until appellant's discovery of the identity by means which she chooses to use.

Id. at pp. 2, 4 (emphasis added).

The foregoing points are of particular force here. Twenty-nine (29) of the forty-four (44) pending cases are suits brought ten years or more after the surgical procedures in question. In at least fourteen of the cases (including Browning) important records — those of Dr. Burt — have apparently been lost and are no longer available.

The test developed by the court of appeals below clearly encourages the bringing of such state claims. Under this new standard, accrual is so greatly divorced from pain and injury —

signs that a lay person can understand and act upon — that "discovery" will never occur, excepting sheer coincidence. Here, for example, the only evidence which the court of appeals held might establish "discovery" was Ms. Browning's acknowledgement that in October of 1988 she had watched a television program about Dr. Burt. (Appendix at 13a). Yet, if Ms. Browning had denied seeing the program (whether she had or not) or if the case were of less notoriety and not subject to extensive media attention, discovery would not have occurred at that time (and perhaps not for years or decades thereafter, if ever). Thus, the new test applied below also leaves the defendant-hospital completely at the mercy of the plaintiff's admissions, effectively eliminating the objective prong of the discovery rule.[7]

The instant case demonstrates the uncertainty and limitless impact of the court of appeals' new discovery rule. Although Plaintiffs have mixed them together, they assert here two separate claims against SEMC for negligent credentialling: one as to Dr. Burt and the other as to Dr. Blue. The *West 57th Street* program, and the adverse publicity which followed, was directed almost entirely at Dr. Burt. Little, if any, information pertinent to the credentialling of Dr. Blue was publicized. Although a massive amount of discovery has been conducted in this litigation, the discovery regarding Dr. Blue has been minimal. It is therefore doubtful that plaintiffs, even now, have been exposed to media or other sources of information apprising them of negligent peer review or a "pattern of incompetence" regarding Dr. Blue. Thus, under the test established below, Plaintiffs' action against SEMC for the

---

7. It is doubtful that a defendant could successfully argue that a plaintiff *should have* seen a particular TV program or read a particular magazine or newspaper article (or otherwise should have been exposed to a coincidental event making her aware of the hospital's alleged negligence.

negligent credentialling of Dr. Blue, although now pending for nearly three years, probably has yet to accrue!

The instant case demonstrates the dramatic impact of the ruling below: it effectively eliminates the statute of limitations as a defense for a hospital sued on a claim of negligent credentialling. Interestingly enough, this impact is greatest upon the non-negligent defendant, since evidence of negligence is obviously less likely to come to a potential plaintiff's attention where there has been no negligence. Accordingly, the non-negligent defendant is particularly likely to be subject to suit on such claims forever and may be forced to fully defend them on the merits[8] decades after the facts giving rise to the action (even though the plaintiff's malpractice claim against her physician may have expired many years earlier).[9]

The ruling below is also likely to foster unwarranted litigation against hospitals. Plaintiffs who have failed to diligently pursue claims against their physicians and find them barred by the statute of limitations will look to hospitals and negligent credentialling claims as a means to salvage something. Large payouts to undeserving claimants may result simply because the costs of defending on the merits are substantial.

---

8. This is a very difficult claim for a hospital to defend because of the servere restrictions upon the evidence which may be used. R.C. §§ 2305.25 and 2305.251 prohibit introduction into evidence of any of the matters considered or actions taken by hospital credentialling committees.

9. This litigation, again, is illustrative of the point. In most of these cases, plaintiffs' actions against Dr. Burt accrued shortly after their surgeries ten (and more) years ago. Their suits for malpractice against him accordingly expire nine (or more) years ago. The test established below nevertheless allows these suits against SEMC.

Another incongruity of the standard adopted by the court of appeals is that it would suspend operation of the statute of limitation even where a patient has suspected malpractice, investigated his or her rights and concluded that there was no negligence. Only the hospital which was *prima facia* negligence would have the benefit of the statute of limitation at all and even it only after the evidence of its negligence had come to the patient's attention by happenstance.

Finally, the drastic extension of the statute of limitations which will result from the decision below is likely to put hospitals at an unfair and inappropriate disadvantage in defending such cases. One defense to a negligent credentialling claim is that there was no malpractice on the part of the physician in question (or that the departure from the standard of care did not cause the alleged injuries). Many years after the fact this may be difficult to prove,[10]

---

10. In *Richardson v. Doe* (1964), 176 Ohio St. 370, 372, this Court emphasized the importance of requiring medical malpractice actions to be brought promptly:

> With the passage of time, it becomes more and more difficult for a physician to establish that he exercised due care in performing his services. If sufficient time passes, it may be impossible to determine whether the present physical condition of a person is the result of a lack of care and skillin prior treatment or the result of factors unrelated to treatment.
>
> Because of the possibility of unwarranted and fraudulent claims which would be difficult to disprove, the General Assembly in 1984 amended the one year statute of limitations, Section 4983 Revised Statutes (Section 2305.11 Revised Code), to include actions for malpractice. 91 Ohio Laws 299.

especially if the physician is no longer around or does not want to get involved. That physician (the party best able to defend the malpractice claim), shielded by the statute of limitations, may choose to avoid the process altogether. Thus, the hospital is left to defend that aspect of the case alone, without the participation of the physician and likely without benefit of critical records that have been lost or destroyed years before.

In short, the decision below threatens to have a multitude of untoward effects. It eliminates the duty of a plaintiff to investigate possible claims and, thus, leaves hospitals and other potential defendants (except for the primary physician) open to litigation for many, many years after the facts giving rise to the cause of action. Potential defendants who have not been negligent, in particular, will likely be completely deprived of the benefits of the statute of limitations. Further, there is no logical reason to believe the Second District will limit this ruling to hospitals and negligent credentialling claims. If extended, the decision below may effectively eliminate the statute of limitations in all but the most clear cut of cases.[11]

Ms. Browning was aware of her condition, related it to her

11. Even in outwardly simple cases, one can conceive of new causes of action coming to light years after the facts giving rise to the suit. Take, for example, an automobile accident at an intersection. Presumably, the parties driving the vehicles are immediately put on notice of the need to pursue claims against each other. However, five years later one of the parties learns that the other driver was employed and acting in the course of business at the time of the accident. Can that party then sue the employer? Ten years later that same party reads in the newspaper that there has been other accidents at the same location and surmises that the intersection may have been negligently maintained. Should he or she be able to then sue the municipality responsible for maintaining the intersection? The possibilities are endless and so may be the litigation arising from a particular set of facts.

medical care and treatment, and was on notice to pursue her possible remedies in August of 1987, if not earlier.[12] At that time (or before)[13] it became her responsibility to investigate her potential claims and to sue all medical Defendants including SEMC, within one year. This she failed to do and, accordingly, her claims against SEMC must be deemed barred by the statute of limitations.

C. Plaintiffs' Claims Against SEMC Were Discoverable Upon Proper Investigation.

Plaintiffs are expected to argue that, even if they had exercised due diligence, they could not have discovered their claims against SEMC until the *West 57th Street* television program revealed the Hospital's alleged negligence peer review in October of 1988 (because of the confidentiality afforded the process by R.C. §§ 2305.25 and 2305.251). If this is so, how did other Plaintiffs come to file their suits against Dr. Burt and SEMC before the *West 57th Street* television program? The answer is simple: they enlisted attorneys and investigated their potential claims.

The bulk of information upon which Plaintiffs rely in bringing their claim was readily available to them upon proper investigation. For example, one of Plaintiff's negligence claims against SEMC comes almost directly from the consent form contained in Ms. Browning's hospital records. *See* Section D below. Thus, had Plaintiffs taken the very elementary step of obtaining their medical records, they would have immediately

---

12. The unchallenged ruling of the court of appeals upholding the dismissal of Ms. Browning's claim against Dr. Blue establishes this.

13. As discussed below, the record shows that Plaintiffs' claims relating to Dr. Burt accrued much earlier that this — in 1982 or 1983.

been alerted to at least some of the negligence claims they now assert.

Similarly, nothing prevented Plaintiffs from investigating whether Dr. Burt had previously been sued for malpractice (or SEMC sued regarding Dr. Burt). Such information was readily available at the county courthouse. It would have identified other patients who were allegedly malpracticed (i.e., perhaps indicating a pattern of incompetence) and attorneys who had accumulated information about the competency of the physician in question. The Montgomery County Medical Society and State Medical Board could have been contacted.

The book authored by Dr. Burt, upon which Plaintiffs greatly rely, was publicly available.

Plaintiffs could have conferred with treating physicians or consulted experts regarding Dr. Burt's surgery. The literature and popular press were yet additional sources of evidence available to the prudent patient acting to investigate her claims. The fact that peer review processes are confidential under Ohio law simply has no bearing on a Plaintiff's duty to investigate her possible remedies. As indicated, there are many sources open to Plantiffs investigating potential claims of negligent credentialling. The matters considered, actions taken, and records maintained by hospital peer review committees cannot be discovered, even if the Plaintiffs file suit and seek to compel the production of such evidence.[14]

---

14. In turn, a hospital cannot introduce any of these matters in defending a negligent credentialling claim. This highlights a significant conflict between the legislature's mandate of absolute confidentiality in peer review proceedings and this Court's dicta in *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 258-259, indicating a hospital may be liable for the negligence of its peer review committees. If

(Cont'd)

Clearly, Plaintiffs had avenues available to them to investigate their potential claims against SEMC. Instead, they took no action. Their extreme delay in bringing suit and utter failure, for years, to pursue their rights justifies the trial court's dismissal of their action.

D. The Record Warranted Summary Judgment For SEMC, Even Under The Erroneous Legal Standard Which The Court Of Appeals Employed.

Because the court of appeals formulated its legal standard *sua sponte* and without legal or factual argument from the parties, it overlooked the fact that Ms. Browning had full knowledge since 1982 of the facts of one of the claims she asserted against SEMC. If she forgot such facts, a review of her hospital record would have provided clear and conspicuous written evidence of them, evidence placed in the record at SEMC's instance.

The court of appeals' opinion includes the assertion: "There is no evidence before this court that the appellant knew or should have known that the hospital had failed to perform its legal duty toward her until she saw the West 57th Street television show in late 1988." This observation overlooks what the records show —

(Cont'd

applied, the *Albain* dicta allows a hospital to be held liable for negligent peer review. R.C. §§ 2305.25 and 2305.251, however, prevent the hospital from defending itself, since it may introduce no evidence as to the matters brought to the attention of its peer review committees or the actions taken by those committees. These prohibitions, when coupled with potential liability, constitutes a violation of due process. The legislature recognized this potential conflict and, in 1987, amended R.C. § 2305.25 to provide immunity to hospitals for the "acts, omissions, [and] decisions" of peer review committees. This immunity constitutes another basis for upholding the trial court's dismissal of Plaintiffs' claims against SEMC.

that Plaintiff was aware of at least one of the alleged misdeeds of SEMC as asserted in her complaint, at the time her first surgery was performed. Plaintiffs' complaint read, in pertinent part:

> 15. Defendant, St. Elizabeth Medical Center negligently, intentionally, willfully, and wantonly acted to cause injury and damages to the Plaintiff by:
>
> * * *
>
> b. negligently and knowingly permitted James Burt, M.D. to perform experimental surgery upon the genital and reproductive organs of females, including the Plaintiff. . . .

The Executive Committee letter, which Ms. Browining signed on February 5, 1982, expressly advised her that the "female coital area reconstruction" which she would undergo two week's later was, "unproven," "non-standard," "not . . . generally accepted," and "not documented by ordinary standards . . ." A review of the hospital records at any time after the 1982 surgery would have fully reminded Ms. Browning of all the facts of one of her negligence claims. An examination of her chart by counsel would likewise have disclosed that the Executive Committee knew in advance of the unconventional nature of the surgery and pointedly refused to vouch for it.

Had Plaintiffs or their counsel investigated their potential claims against Drs. Burt or Blue, both of whom they had cause to suspect of negligence after the 1982 surgery, they would have seen demonstrated in the hospital chart one of the claims they eventually brought against SEMC. The fact that such claim was not

one on which relief could be granted under *Albain v. Flowers* (1990) 50 Ohio St. 3d 251, does not alter the fact that Plaintiffs had cause to inquire into their rights against SEMC in 1982. Even based on the plainly incorrect legal standard which it applied, the court of appeals overlooked evidence in the record of inferable knowledge on one of her negligence claims against SEMC, knowledge she possessed seven years before she sued.

E. Plaintiffs' Claims Relating to Dr. Burt Accured in 1983, At the Lates, And Are Barred Regardless of What Statute of Limitations Applies.

As previously noted, Plaintiffs state two claims against SEMC, one for negligently credentialling Dr. Burt and the other for negligently credentialling Dr. Blue. The trial court found no need to separate the two claims for purposes of SEMC's motions. It determined that all of Plaintiffs' claims were governed by the one-year statute of limitations and, since accrual occurred more than a year before suit was filed, the entire case was barred. However, the court of appeals (again without the urging of any of the parties) found that Mr. Browning's derivative claims were governed by the four-year statute of limitations, R.C. § 2305.09, and reinstated his claims against Dr. Blue. (Appendix at 15a). That ruling, if correct, *may* also render timely Mr. Browning's derivative claims against SEMC *as they relate to the credentialling of Dr. Blue.*[15] No matter what statute of limitations is applied, though, the entirety of Plaintiffs' claims relating to Dr. Burt are barred.

The record unequivocally establishes that Plaintiffs' claims

---

15. If the termination rule still exists (*Allenius* places that in doubt) and applies to a hospital in these circumstances, Mr. Browning's claims relating to Dr. Blue accrued in 1986, when his wife terminated her treatment with Dr. Blue. Plaintiffs' action, brought in 1989, was thus, filed within the four year period.

relating to Dr. Burt accrued in 1983, at the latest. By that time, multiple cognizable events had occurred, alerting Ms. Browning to her condition and putting her on notice to pursue her possible remedies.

Dr. Burt performed surgery on Ms. Browning on February 19, 1982. Prior to that surgery, Ms. Browning's only medical problems were bladder problems and painful sexual intercourse. (Rec. at 88, 93, 157). Following the surgery, she developed a myriad of unusual and exacerbated sumptoms. She experienced worsened bladder problems and worsened sexual problems, as well as newly-developed kidney problems (including severe infections and bleeding), urinary incontinence, vaginal pain, and bowel problems (Rec. at 89-91 96-99, 118, 130-134). She also had to employ an indwelling urinary catheter for six months following her surgery. (Rec. at 130). After the catheter was removed, Ms. Browning became aware of these numerous problems. As she stated, "when he took the catheter out [in 1982] and I couldn't go is when I became aware of I had problems then," (Rec. at 99). At that time she realized that she "should have been able to go on my own without any problems but I wasn't," and that she "wasn't able to void like I should." (Rec. at 130-131). She recognized that this problem with voiding was different from her urinary problems with voiding before the 1982 surgery. (Rec. at 131-132). She also began experiencing new and distinct sexual problems which, according to Ms. Browning, Dr. Burt told her she should not be having. (Rec. at 133). These problems became evident several weeks after her surgery when Plaintiffs attempted to have sex but couldn't because Ms. Browning "wasn't healed up in there like I should have been." (Rec. at 133). She knew that her sexual relationship with her husband "wasn't normal" after the 1982 surgery because her "husband had trouble penetrating. It seemed like it was too small in there. It cause me an awful lot of pain." (Rec. at 134).

Thus, by the fall of 1982, Ms. Browning was well aware of her medical condition and its possible relation to the surgery performed by Dr. Burt. She was in possession of more than enough facts to put a reasonable person on notice of the need to pursue her possible remedies. Ms. Browning, in fact, pursued one such remedy — she stopped treating with Dr. Burt shortly thereafter, in 1983 ("he wasn't doing me any good"). (Rec. at 86, 115, 135). She failed, however to pursue her legal remedies.

Under the cognizable event test of *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, Ms. Browning's claims relating to Dr. Burt accrued in 1982 (or at the latest, in 1983). Her husband's derivative claims also accrued at that time. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1, 6. Thus, even if the four-year period of limitations applies to Mr. Browning's claims, all of Plaintiffs' claims relating to Dr. Burt expired by 1987, 1987, two years before they filed this action. Accordingly, the trial court was clearly correct in dismissing as time-barred all of Plaintiffs' claims against SEMC for (allegedly) negligently credentalling Dr. Burt.

Proposition of Law No. 2:

A Party Waives Alleged Error When He or She Fails to Raise It In The Common Pleas Court And The Court of Appeals.

The court of appeals erred in applying the four-year statute of limitations to Mr. Browning's derivative claims and the separate cognizable event test to Plaintiff's claims against SEMC, because Plaintiffs waived any such points of error. Mr. Browning *never* asserted, at any state of the proceedings below, that the four-year period of limitations was applicable to his claims. Similarly, Plaintiffs never advocated the separate cognizable event test

utilized by the court of appeals to revive their claims against SEMC.

SEMC's Motion for Summary Judgment sought dismissal of the claims of both Plaintiffs: "Plaintiffs' claims are time-barred because they were not brought within the mandatory one-year time period after accrual of the claims. . . ." (Rec. at 40). The opposition to that Motion did not raise the four-year statute. It implicitly conceded the applicability of the one-year statute, but argued that "discovery" had not occurred until six months before the suit was filed. (Rec. at 166-167).

The judgment entered by the trial court on January 3, 1990 *expressly* dismissed the claims of both Plaintiffs against SEMC. (Rec. at 340). The Notice of Appeal to the Second Appellate Court of Appeals was filed on behalf of "Plaintiffs." (Rec. at 361). On appeal Plaintiffs, again, did not assert that the four-year period of limitations should apply to Mr. Browning's claims. In fact, no error was assigned in the court of appeals on behalf of Mr. Browning at all. On these facts, Plaintiffs effectively stipulated to the applicability of the one-year statute and waived any argument that the four-year provision might apply to any of their claims.

Issues raised *sua sponte* in the court of appeals and not argued in the trial court are not properly before the appellate court. *Ridgley, Inc. v. Board of Zoning Appeals, City of Wadsworth* (1968), 28 Ohio St. 3d 357, 359. Even if a party raises the issue in the court of appeals, it is deemed waived if it was not briefed and argued below. *Thompson v. Preferred Risk Mutual Insurance Company* (1987), 32 Ohio St. 3d 340, 342. Thus, Mr. Browning clearly waived any argument that the four-year statute applies to his claims. *Vance v. St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, 42, fn. 9, overruled on other grounds by *Schwan v. Riverside*

Methodist Hospital (1983), 6 Ohio St. 3d 300 (Failure of plaintiff bringing derivative claims to assert in the trial court applicability of the four-year statute rather than the one-year malpractice period of limitation held to constitute a waiver of that issue).

The same principal of waiver applies to the new, separate cognizable event test developed *sua sponte* by the court of appeals. Plaintiffs *never* advocated at any point in the proceedings below that their claims against SEMC should accrue at a different time than their claims against the Defendant physicians. Plaintiffs *never* argued that discovery of SEMC's alleged negligence was integral to accrual of their claims against the Hospital. To the contrary, Plaintiffs argued, as did SEMC, that accrual of their claims against the Defendant physicians would necessarily cause their claims against SEMC to accrue for purposes of the statute of limitations. For example, in opposing SEMC's Motion for Summary Judgment, Plaintiffs asserted that:

> The Plaintiff filed her complaint on April 17, 1989, six months after she was put on notice of the possibility that her symptoms may have been caused by the wrongful acts of Dr. Burt and Dr. Blue.

(Rec. at 170). Plaintiffs further argued, in conclusion:

> Under the *Allenius* decision, the "cognizable event" which alerted the Plaintiff to *the possibility that she may have received negligent medical care* was her viewing of the West 57th Street program.

(emphasis added) (Rec. at 174). In the court of appeals, Plaintiffs

continued to argue that *discovery of the physicians' malpractice* was the critical event for accrual of their claims:

> In the case at bar, Mrs. Browning, just like the patient in *Herr* [*v. Robinson Memorial Hospital* (1990), 49 Ohio St. 3d 6] was not actually informed of Dr. Blue and Dr. Burt's malpractice until April 3, 1989 when St. Stanisic rendered his expert opinion that malpractice occurred! It was at this precise time that the causal connection as required by *Herr* was established. This event meets the first or causal element of the *Herr* standard. Mrs. Browning was then on notice and in fact did pursue appropriate remedies.

(Rec. at 378)

In short, the separate cognizable event test developed by the court of appeals was wholly unadvocated and, in fact, contradicted the positions taken by the parties throughout the proceedings below. Plaintiffs clearly waived any argument that a separate test for accrual applied to their claims against SEMC or that discovery of the Hospital's alleged negligence was an element of this inquiry. The court of appeals therefore erred in reversing on these grounds.

IV. CONCLUSION

The decision of the court of appeals in this case nodded towards this Court's rulings in *Hershberger* and *Allenius* while discarding their substance. The court of appeals' adoption of a "discovery of the negligence" test, in fact, flies in the face of the repeated decisions of this Court expressly rejecting such a rule.

The court of appeals also erred in eliminating the duty of a Plaintiff to investigate potential claims. A statutory period of limitation constitutes a time to investigate and evaluate potential claims, to decide whether to sue and whom to sue and to begin — or forego — a lawsuit. The limitation period is not a time for mere deliberation of temporizing after the investigation and evaluation are finished. Yet, even though Plaintiff, Ms. Browning was deemed to have discovered her injuries to have connected them to negligent medical care long before filing suit, the court of appeals placed no obligation whatsoever upon her to investigate and identify parties who might be responsible for those injuries. This ruling, carried to its logical extreme, obviates the statute of limitations in most cases and destroys any finality to litigation (or potential litigation) (since Plaintiffs may sue other potentially responsible parties on into the indefinite future as their roles in causing the injuries are, by happenstance, brought to the attention of Plaintiffs).

Proper application of the statute of limitations and "discovery rule" established by the decisions of this Court demonstrates that Plaintiffs' claims are time-barred. SEMC urges this Court to reverse the court of appeals' ruling below and reinstate the trial court's decision dismissing, in their entirety, Plaintiffs' claims against it.

Appendix A

Respectfully submitted,

Frank C. Woodside, III (0000636)
John E. Schlosser (0007831)
K.C. Green (0005435)
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202-3172
(513) 977-8200

Attorneys for Defendant-Appellant,
St. Elizabeth Medical Center

Appendix A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following, by first-class U.S. mail, this __ day of __, 1992:

Neil F. Freund, Esq.
Freund, Freeze & Arnold
1800 Dayton Arcade Center
1 South Main Street
Dayton, Ohio 45402

Marylee Gill Sambol, Esq.
Olde Town Professional Bldg.
109 North Broadway Avenue
Trotwood, Ohio 45246

James Hughes, Esq.
Bricker & Eckler
100 S. 3rd Street
Columbus, Ohio 43215